Office - Supreme Court
FILED
JAN 16 1982
ALEXANDER L. STEVAS
CLERK

Nos. 80-1012, 80-1030 and 80-1052

IN THE

Supreme Court of the United States

October Term, 1981

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California,

Petitioner,

vs.

NORMAN WILLIAMS COMPANY, *et al.*,

Respondents.

BOHEMIAN DISTRIBUTING COMPANY,

Petitioner,

vs.

NORMAN WILLIAMS COMPANY, *et al.*,

Respondents.

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,

Petitioner,

vs.

NORMAN WILLIAMS COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT.

JOINT APPENDIX

(Names and addresses of attorneys on inside cover.)

No. 80-1012 PETITION FOR CERTIORARI FILED DECEMBER 22, 1980.
Nos. 80-1030 and 80-1052 PETITIONS FOR CERTIORARI FILED DECEMBER 23, 1980.
CERTIORARI GRANTED NOVEMBER 30, 1981.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

GEORGE DEUKMEJIAN,
Attorney General,
GEORGE J. ROTH,
Deputy Attorney General,
555 Capitol Mall, Suite 350,
Sacramento, Calif. 95814,
(916) 445-6221,
Attorneys for Petitioner,
Baxter Rice, Director
Department of Alcoholic
Beverage Control,

FRANK ROTHMAN,
CHRISTINA A. SNYDER,
WYMAN, BAUTZER, ROTHMAN,
KUCHEL AND SILBERT,
2049 Century Park East,
Los Angeles, Calif. 90067,
(213) 556-8000,
GEORGE MIRON,
FRANK H. EASTERBROOK,
Of Counsel,
Attorneys for Petitioner,
Bohemian Distributing Company,

JOSEPH A. BALL,
JOHN R. McDONOUGH,
MICHAEL J. MALONEY,
JAMES POLISH,
Counsel of Record,
BALL, HUNT, HART, BROWN
AND BAERWITZ,
445 South Figueroa Street,
Los Angeles, Calif. 90071,
(213) 628-0924,

WILLIAM T. CHIDLAW,
Counsel of Record,
A Professional corporation
Point West Executive Centre
1455 Response Road, Suite 191,
Sacramento, Calif. 95815,
Attorneys for Petitioner,
Wine & Spirits Wholesalers
of California.

LELAND R. SELNA, JR.,
MAX LIEBERMAN,
GEORGE G. WEICKHARDT,
FELDMAN, WALDMAN & KLINE,
234 Montgomery Street,
San Francisco, Calif. 94104,
(415) 981-1300,

THOMAS W. MARTIN,
926 J. Street, Suite 1116,
Sacramento, Calif. 95814,
(916) 442-1886,
Attorneys for Respondent.

JOINT APPENDIX

Page

1. List of Docket Entries in Case No. 3-CIV-19089, Court of Appeal of the State of California, Third Appellate District ..... App. p. 1
2. List of Docket Entries in Case S.F. No. 24082, Supreme Court of the State of California 11
3. Amended Petition for Writ of Mandate and/or in the Alternative, Prohibition and/or Certiorari [C.C.P. 1068; 1069; 1085; 1086; 1102; 1103; B. & P. C. § 23090.5; California Rules of Court, Rule 56], Filed November 20, 1979, in California Court of Appeal 12
4. Exhibit A Of Exhibits in Support of Petition for Writ of Mandate and/or in the Alternative, Prohibition and/or Certiorari, With Supporting Memorandum of Points and Authorities, Refiled November 1, 1979, in California Court of Appeal After Transfer From Supreme Court of California 27
5. Complaint in Intervention (of Bohemian Distributing Company), Filed December 6, 1979, in California Court of Appeal 46
6. Complaint in Intervention (of Wine & Spirits Wholesalers of California), Filed November 29, 1979 by Order of December 6, 1979, in California Court of Appeal 49
7. Exhibit L Of Exhibits to Petitioners' Reply Memorandum of Points and Authorities in Support of Petition and Request for Stay of Enforcement, Filed December 21, 1979, in California Court of Appeal 55
8. Order of the California Court of Appeal That the Alternative Writ of Mandate and a Stay Issue, Filed December 31, 1979 74

Page

9. Alternative Writ of Mandate and Stay, Issued by Wilfried J. Kramer, Clerk, California Court of Appeal, Filed December 31, 1979 76

10. Demurrer of Intervenor Bohemian Distributing Company to Amended Petition for Writ of Mandate and/or, in the Alternative, Prohibition and/or Certiorari and Memorandum of Points and Authorities in Support Thereof, Filed January 21, 1980, in California Court of Appeal 78

11. Answer of Intervenor Bohemian Distributing Company to Amended Petition for Writ of Mandate and/or, in the Alternative, Prohibition and/or Certiorari, Filed January 21, 1980, in California Court of Appeal. (Filed Concurrently With Demurrer) 86

12. Return of Intervenor Wine & Spirits Wholesalers of California to Alternative Writ by Way of General Demurrer and Answer, Filed January 21, 1980, in California Court of Appeal 103

13. Order of the Supreme Court of the United States Granting Petitions for Writ of Certiorari, Filed November 30, 1981 123

14. Contents of Appendices to Petitions for Writ of Certiorari, Respectively, of Baxter Rice, Department of Alcoholic Beverage Control, of Wine & Spirits Wholesalers of California and of Bohemian Distributing Company. These Appendices have not been reprinted but are incorporated by reference and itemized herein 124

Appendices to Petitions for Writ of Certiorari, filed with the United States Supreme Court, respectively, of Baxter Rice, Department of Alcoholic Beverage Control (No. 80-1012), of Wine & Spirits Wholesalers of California (No. 80-1052), and of Bohemian Distributing Co. (No. 80-1030). These Appendices have not been reprinted but are incorporated by reference and itemized herein.

1. List of Docket Entries in Case No. 3-CIV-19089, Court of Appeal of the State of California, Third Appellate District.

[Names and Addresses of Counsel for Parties and Amici Curiae Omitted in the Printing of this List of Docket Entries].

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation doing business as GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC. a California corporation; FREDERICA AULDRIDGE, doing business as SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE, doing business as TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR. and SHIRLEY D. KIRBY, doing business as HOUSE OF FINE SPIRITS,

Petitioners,

vs.

BAXTER RICE, Director, Department of Alcoholic Beverage Control,

Respondent,

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,

Intervenors,

BOHEMIAN DISTRIBUTING COMPANY,

Intervenor.

DATE	PROCEEDINGS
10/24/79	Filed petition for writ of mandate and/or prohibition and/or certiorari in Supreme Court.
10/31/79	Petition transferred by Supreme Court to 3 C.A.

1979

Nov. 1 Refiled above record in Court of Appeal, Third District. (effective date of statute (A.B. 499) is 1/1/80)

Nov. 14 Filed declaration and order respondent to 11/29/79.

Nov. 14 Filed association of attorneys for petitioner associating Thomas W. Martin, 926 J St., #1116, Sacramento with the Feldman firm.

Nov. 20 Filed petitioners' amended petition for writ of mandate and/or prohibition. (filed with permission of court)

Nov. 29 filed respondent's response to petition for writ of mandate and points and authorities in opposition to petition.

Nov. 29 Filed application of Wine & Spirits Wholesalers of California for leave to intervene and file complaint in intervention and COMPLAINT IN INTERVENTION. (See order dated 12/6/79 granting application.) (In support of respondent)

Nov. 29 Filed application of Bohemian Distributing Co. for leave to intervene in support of respondent ..... (See order dated 12/6/79 granting application.)

Dec. 6 By the Court:

The applications of Wine & Spirits Wholesalers of California and of Bohemian Distributing Co. for leave to file complaints in intervention in support of respondent are granted. Puglia, P. J. Dated: December 6, 1979

Dec. 6 Filed Bohemian Distributing Co.'s Complaint in Intervention.

Dec. 6 Filed Intervenor Bohemian Distributing Co.'s Memo in Opposition Petition for Writ of Mandate, etc.

Dec. 6 Filed Intervenor Wine & Spirits Wholesalers of California's Memo of points and authorities in Opposition to Petition for writ.

Dec. 4 Filed Application for leave to file, and extension of time to file response to complaints in intervention and to respondent's memorandum of points and authorities, & Order to 12/24/79. (Petitioner's)

Dec. 17 Filed request of Wine & Spirits Wholesalers of California that court defer decision on issuance of alternative writ and grant additional time to file additional points & authorities. Request denied, see letter.

Dec. 17 Filed respondent's Supplemental Points and Authorities in Support of Response to Petition.

Dec. 21 Received letter from intervenor Bohemian requesting that court delay acting until 12/28/79, so that they can file further memorandum in opposition.

Dec. 21 Filed Petitioners' Reply Memorandum of Points and Authorities in Support of Petition and Request for Stay of Enforcement and Exhibits to Petitioners' Reply Memorandum of Points and Authorities in Support of Petition and Request for Stay of Enforcement.

Dec. 24 FILED INTERVENOR BOHEMIAN DISTRIBUTING COMPANY'S MEMORANDUM IN OPPOSITION TO AMENDED PETITION FOR WRIT OF MANDATE AND/OR IN THE ALTERNATIVE PROHIBITION AND/OR CERTIORARI.

Dec. 24 FILED SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT. (WINE AND SPIRITS)

Dec. 27 Filed letter from petitioners' requesting response of intervenors' filed on December 24, 1979, be stricken.

Dec. 31 By the Court:

Let an alternative writ of mandate issue. Respondent's and intervenors' written returns are to be served and filed on or before January 21, 1980. Petitioners' replication, if any, is to be served and filed within 15 days after the filing of the returns.

It is further ordered that respondent Baxter Rice, Director, Department of Alcoholic Beverage Control, is to desist and refrain from taking any action or proceeding to enforce Business and Professions Code Section 23672 as amended by Assembly Bill 499 effective January 1, 1980, pending filing of the returns and further order of this court.

Dated: December 31, 1979. Pugila, P. J.

Dec. 31 ISSUED ALTERNATIVE WRIT OF MANDATE WITH STAY.

1980.

Jan. 11 Filed application and order for permission to file Amici Curiae Brief in opposition to issuance of peremptory writ by The Distilled Spirits Council of the United States, Inc.

Jan. 11 FILED AMICI CURIAE BRIEF OF THE DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC.

Jan. 11 Filed alternative writ of mandate and stay with proof of service.

Jan. 21 FILED INTERVENOR BOHEMIAN DISTRIBUTING COMPANY'S MEMORANDUM FILED CONCURRENTLY WITH RETURN ON ALTERNATIVE WRIT OF MANDATE IN OPPOSITION TO AMENDED PETITION FOR WRIT OF MANDATE AND/OR IN THE ALTERNATIVE, PROHIBITION AND/OR CERTIORARI. FILED DEMURRER OF INTERVENOR BOHEMIAN AND FILED ANSWER OF INTERVENOR BOHEMIAN.

Jan. 21 FILED RETURN OF INTERVENOR WINE & SPIRITS WHOLESALERS OF CALIFORNIA AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT.

Jan. 21 FILED MOTION OF INTERVENOR WINE & SPIRITS WHOLESALERS OF CALIFORNIA TO DISSOLVE TEMPORARY STAY ORDER; REQUEST FOR IMMEDIATE RELIEF PURSUANT TO SAID MOTION.

Jan. 21 Filed letter from respondent that the previous documents filed by them should be considered as the return.

Jan. 21 FILED PETITION FOR PERMISSION TO FILE A BRIEF AMICI CURIAE ON BEHALF OF THE WINE AND SPIRITS WHOLESALERS OF AMERICA, INC. AND ORDER GRANTING PERMISSION TO FILE.

Jan. 21 FILED AMICI CURIAE BRIEF OF THE WINE AND SPIRITS WHOLESALERS OF AMERICA, INC.

1980

Jan. 22 FILED PETITION FOR PERMISSION TO FILE A BRIEF AMICI CURIAE ON BEHALF OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, HELPERS OF AMERICA, LOCAL 595, IN OPPOSITION TO ISSUANCE OF A PEREMPTORY WRIT AND ORDER GRANTING PERMISSION TO FILE.

Jan. 22. FILED BRIEF AMICI CURIAE ON BEHALF OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, etc.

Jan. 23 Filed petitioners' letter opposition to motion to dissolve the temporary stay.

Jan. 28 Filed Attorney General's letter joining in motion to dissolve temporary stay order and request for immediate relief.

Jan. 29 Filed petitioners' letter in response to respondent's request to dissolve temporary stay.

Jan. 31 Filed declaration of Sante Quattrin in support of motion to dissolve stay order, Wine & Spirits Wholesalers of California.

Jan. 31 Received letter from Wine & Spirits Wholesalers of California regarding the filing of points and authorities in reply to opposition.

Feb. 4 Filed Wine & Spirits Wholesalers of California memorandum of points and authorities in reply to opposition by petitioners to motion to dissolve stay order.

Feb. 4 Filed letter from petitioner regarding additional material filed by Wine & Spirits Wholesalers of California, etc.

Feb. 5 Filed Bohemian Distributing Company's Motion to Dissolve Temporary Stay Order, P&A.

Feb. 5	Filed Petitioner's Replication and memordandum in support.
Feb. 8	Filed Petitioner's Memorandum in Opposition to Motion to Dissolve Stay.
Feb. 14	By the Court: The motions of the intervenors to dissolve temporary stay are denied. Dated: February 14, 1980 Puglia, P.J.
Feb. 20	1980 CAUSE ORDERED ON May 21 '80 CALENDAR AT 9:30 A.M.
April 7	Filed application and order of Consumers Union of United States, Inc., West Coast Regional Office for leave to file a brief amicus curiae in support of petitioners.
April 7	FILED BRIEF OF AMICUS CURIAE CONSUMERS UNION OF UNITED STATES, INC.
April 21	FILED APPENDICES TO AMICUS CURIAE BRIEF OF CONSUMERS UNION.
April 18	Filed petition of Wine & Spirits Wholesalers of America to present oral argument as amici curiae. (filed by Heller firm)
April 18	Filed letter of White & Case requesting permission to present oral argument as amicus curiae on behalf of Wine & Spirits Wholesalers of America. (filed by White & Case).
April 21	Filed Intervenor Wine & Spirits Wholesalers of California's letter requesting 30 minutes for oral argument.
April 23	Filed Intervenor Bohemian Dist. Co's letter requesting 30 minutes for oral argument.

April 22	Filed petitioners' opposition to amicus curiae's request for oral argument and intervenors' request for more than 15 minutes for oral argument.
April 23	Filed intervenor Bohemian Distributing Co's. letter citing case of Calif. Retail Liquor Dealers Assn. v. Midcal Aluminum.
April 25	Filed letter from Wine & Spirits Wholesalers of California discussing Midcal Aluminum case.
April 25	Filed letter from petitioners commenting on Midcal Aluminum Case.
May 1	Filed petitioners' response to Wine & Spirits Wholesalers of California's letter of April 25, 1980.
May 5	Filed letter from petitioners and intervenors and letter from respondent requesting 1 hour for oral argument by petitioners and intervenors and 15 minutes by respondent.
May 5	Filed respondent's supplemental letter brief.
May 9	Filed Intervenors' Motion to Strike and Motion to Exclude Evidence and Memorandum of Points and Authorities in Support Thereof and Appendix.
May 12	Filed petitioners' letter dated May 9, 1980 commenting on Mid-Cal decision.
May 15	Filed petrs' letter commenting on time allotted for oral argument and requesting one-half hour for each side.
May 16	Filed petitioners opposition to intervenors' motion to exclude evidence.

May 21 Cause called. Messrs. George Weickhardt, Thomas Martin and Harry M. Snyder appeared for petitioners. Mr. Weickhardt argued. Mr. Snyder argued. Mr. Martin argued. Messrs. George Ball and Frank Rothman appeared for intervenors.

Mr. Ball argued. Mr. Rothman argued. Mr. George Roth, Deputy Attorney General, argued for respondent. Cause submitted.

July 17 Let a peremptory writ of mandate issue ordering respondent to refrain from enforcing that portion of Business and Professions Code section 23672 which provides: "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent." (*CERTIFIED FOR PUBLICATION.*)

REYNOSO, J.

We concur: Puglia, P. J.
Evans, J.

8/26/80 Respondent filed for hearing in Supreme Court.

8/28/80 Intervenor (Bohemian) for hearing in Supreme Ct.

8/29/80 Rec'd. copy of petition for hearing of Wine & Spirits Wholesalers.

9/5/80 Supreme court extended time to grant or deny until 10/15/80 or until they act.

9/8/80 Rec'd answer to petition.

9/24/80 HEARING DENIED BY SUPREME COURT, J. Manuel is of the opinion that the petition should be granted.

Sept. 25	Issued peremptory writ of mandate.
12/22/80	Received copy of Petitioner's Petition for Writ of Certiorari in U.S.S.Ct. (Rice)
12/24/80	Received copy of Wine & Spirit's Petition for Writ of Certiorari in U.S.S.Ct.
12/29/80	Received copy of petition for writ of certiorari filed by Bohemian Dist.
12/8/81	Filed U.S.S.Ct. orders grant writ of certiorari in above case.

2. List of Docket Entries in Case S.F. No. 24082, Supreme Court of the State of California.

[Material Omitted in Printing Is Identical to the Court of Appeal Docket Sheet Entries]

DATE	PROCEEDINGS
8/26/80	Filed Respondent's Motion for Hearing Due 9/15/80
8/26/80	Filed Real Party in Interest's Bohemian Petition for Hearing Due 9/15/80
8/26/80	Filed Real Party in Interest's Wine & Spirits Petition for Hearing Due 9/15/80
9/05/80	Filed Petitioners Answer to Petition
9/05/80	Time for Granting or Denying Hearing Extended to 10/15/80 (Etc.)
9/24/80	Hearing Denied Manuel J. of The Opinion That the Petition Should Be Granted
	Cert. to U.S.S.C. 80-1012 80-1030 80-1052

3. Amended Petition for Writ of Mandate and/or in the Alternative, Prohibition and/or Certiorari [C.C.P. 1068; 1069; 1085; 1086; 1102; 1103; B. & P. C. § 23090.5; California Rules of Court, Rule 56], Filed November 20, 1979, in California Court of Appeal.

FELDMAN, WALDMAN & KLINE
LELAND R. SELNA
MAX LIEBERMAN
GEORGE G. WEICKHARDT
27th Floor, Russ Building
235 Montgomery Street
San Francisco, CA 94104
(415) 981-1300

THOMAS W. MARTIN
926 J. Street, Suite 1116
Sacramento, CA 95814
(916) 442-1886
Attorneys for Petitioners

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT

No. 3-CIV-19089

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY INC., a California corporation d/b/a GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE d/b/a SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE d/b/a TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR. and SHIRLEY D. KIRBY d/b/a HOUSE OF FINE SPIRITS

Petitioners,

vs.

BAXTER RICE, Director, Department of Alcoholic Beverage Control,

Respondent.

Petitioners NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation d/b/a GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE d/b/a SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE d/b/a TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR. and SHIRLEY D. KIRBY d/b/a HOUSE OF FINE SPIRITS, petition this Court for a writ of mandate and/or, in the alternative, prohibition and/or certiorari ordering Respondent BAXTER RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, to refrain and desist from enforcing A.B. 499, an unconstitutional statute which will prohibit importation of distilled spirits without the permission of the brand owner.

A.B. 499 amends Business and Professions Code § 23672 to read as follows:

> "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as ~~the~~ *an* authorized importer of such brand by the ~~licensee who filed the minimum retail price schedule for such brand pursuant to Section 24755~~ *brand owner or his authorized agent*. Such distilled spirits imported into California shall come to rest at the warehouse for the account of such licensed importer, before sale and delivery to a retail licensee."

The amended version of the statute will become effective on January 1, 1980.

A.B. 499 empowers the big out-of-state distilling companies to dictate who may import liquor into California.

Since the statute will allow the distillers to exclude competition to their franchised distributors, it will also enable them to control wholesale prices. Approximately 90% of the distilled spirits consumed in California are nationally advertised brands produced by large out-of-state distilling companies. These nationally advertised brands are distributed in California through a highly concentrated network of franchised distributors: 6 distributors in the Los Angeles area and 6 in the Bay Area handle approximately 70% of the wholesale volume in the State. These franchised distributors rigorously adhere to artificially high resale prices "suggested" by the distillers.

Under current law the wholesaler petitioners, who are non-franchised or "independent" wholesalers, may import major brand liquor purchased in other states without the permission of the brand owners. Petitioners presently sell this liquor to retailers at prices significantly below the artificially inflated "suggested" prices prescribed by the distillers. A.B. 499 will allow the big distillers to forbid the petitioners to import nationally advertised brands and will thus destroy price competition at the wholesale level. In fact, the big distillers have already refused to give the petitioners permission to import their brands. The statute will thus mean that the state will be locked into a system of distribution parcelled out among a few favorites of the distillers who have proven themselves ready to comply with the high "suggested" prices. The statute, in short, means artificially inflated liquor prices at the wholesale and, consequently, the retail level.

The statute is unconstitutional on its face on four grounds: (1) it delegates the power to regulate importation of liquor in violation of an express prohibition on such delegation in the State Constitution; (2) it deprives petitioners of due

process; [(3) *it is inconsistent with and preempted by the Federal antitrust laws*;] and (4) it denies petitioners equal protection of the laws.

1. *Beneficial Interest of Petitioners*

Petitioners NORMAN WILLIAMS COMPANY, SCHWAB DISTRIBUTING COMPANY, INC. and LEWIS-WESTCO & CO. are, and at all times mentioned in this petition have been, distilled spirits importers and wholesalers duly licensed by the State of California to import distilled spirits into California pursuant to Business & Professions Code Sections 23374.5 and 23378. Pursuant to their respective licenses, said petitioners are each presently engaged in the importation of distilled spirits into California from other states. Petitioners GREENE CAT LIQUORS ("GREENE CAT"), INC., FREDERICA AULDRIDGE ("AULDRIDGE"), RALPH E. PIERCE & SHARON L. PIERCE ("PIERCE") and WILLIAM A. KIRBY, JR. and SHIRLEY D. KIRBY ("KIRBY") are each retailers and holders of an off-sale retailer's license for distilled spirits; GREENE CAT, AULDRIDGE, PIERCE and KIRBY each currently have monthly gross sales of distilled spirits of under $17,000 and obtain supplies from time to time from one or more of the wholesaler petitioners.

The wholesaler petitioners have already sought and been refused authorization from the major distillers to act as importers of their brands under A.B. 499. Enforcement of the statute will thus foreclose the wholesaler petitioners' right to import into California any of the major brands of distilled spirits (which constitute 90% of California consumption) and prevent the retailer petitioners from obtaining distilled spirits from the wholesaler petitioners at discount prices. Therefore, all petitioners are within the class of persons beneficially interested in staying the enforcement by

Respondent of Business & Professions Code § 23672 as amended by Assembly Bill 499 prior to its effective date of January 1, 1980.

2. *Capacity of Respondent*

Respondent BAXTER RICE is the duly appointed Director of the Department of Alcoholic Beverage Control charged by law with administering and enforcing the provisions of the Alcoholic Beverage Control Act (Business & Professions Code §§ 23000 *et seq.*). Accordingly, beginning January 1, 1980, Respondent is required to enforce Business & Professions Code § 23672 as amended by Assembly Bill 499.

3. *Statement of Facts*

The great bulk of distilled spirits consumed in California (except brandies) are produced outside the state and must be imported. The industry of distilling and distributing distilled spirits in the United States, including California, is relatively concentrated, and in California there is very little intrabrand price competition at the wholesale level.

The six largest distillers — Seagram, National Distillers, Heublein, Hiram Walker, Schenley and Brown-Forman, respectively — control the production and distribution of approximately 60% of all distilled spirits consumed in the United States. The next nine largest distillers — Bacardi, Fleischmann, Somerset, Gordon/Renfield, Jim Beam, Glenmore, Liggett, Buckingham, and Foremost-McKesson, respectively — control another 25% of the market. See Exhibit A-1 which is a true and correct copy of "1978's Gainers and Losers in the Liquor Business," *Business Week*, 4-2-79, p. 92; Exhibits A-2 through A-4 respectively are true and correct copies of pp. 50, 54 and 131 of *The Liquor Handbook 1979*, Gavin Johnson Associates; Exhibit A-5 is

a true and correct copy of *Barron's*, March 6, 1978, pp. 9-14. These publications are standard industry sources for market data. These 15 companies plus several others market nationally advertised brands of distilled spirits. Nationally advertised brands account for approximately 90% of California consumption. The remaining 10% consists of numerous small "private label" brands which are not nationally advertised. See Exhs. A and B.

On May 30, 1978, this Court, in *Rice v. A.B.C. Appeals Bd.*, 21 Cal. 3d 431, 146 Cal. Rptr. 585 (1978) invalidated California's liquor fair trade laws as inconsistent with and preempted by the Sherman Antitrust Act. Prior to this decision, Business & Professions Code § 23672 prohibited a duly licensed distilled spirits importer from importing into California any brand of distilled spirits unless such importer was designated as an "authorized importer" by the party who filed the minimum retail price schedule for the brand, i.e. the brand owner. Petitioners had never been designated by any major brand owner as an "authorized importer" and, as a consequence, were completely barred from importing major brand liquor into California.

After *Rice* invalidated § 23672 as it was then phrased, duly licensed distilled spirits importers have been free to import nationally advertised brands of distilled spirits even if they have not been designated as an "authorized importer" by the brand owner. Accordingly, the wholesaler petitioners herein began purchasing nationally advertised brands of distilled spirits from jobbers in the State of Oklahoma, where distillers and jobbers are required by Oklahoma law to sell their brands without discrimination to all licensed wholesalers. Petitioners have been importing these spirits into California and reselling to retailers at prices significantly below the prices at which the authorized or franchised distributors sell to the retailers. (See Exhs. D,

E, G.) California *retail* liquor prices which before Rice were the highest in the country, *Rice, supra*, 21 Cal. 3d at 455, have now fallen tc level below the national average. See Exhibit A-4. Independent (non-franchised) wholesalers like petitioners now handle about ten to fifteen percent of the volume of major distilled spirits distributed in the State. See Exhibit B, which is a true and correct copy of Monthly Reports of the California State Board of Equalization for distilled spirits excise tax payments. The independent wholesalers currently sell distilled spirits imported from Oklahoma to both large discount retailers and small family-owned retailers, such as the retailer petitioners herein.

Unlike the independent wholesalers, the authorized or franchised distributors of the distillers are supplied directly by the distillers. The franchised distributors are generally much larger than the independent distributors and control approximately 85% of the distilled spirits wholesale volume in California. (See Exhibit B.) In each major marketing area in California, each distiller usually has only one or two franchised distributors. Since the distilling industry is concentrated, the practice of distributing through only one or two franchised distributors likewise results in concentration at the wholesale level in California. Thus six major franchised distributors in Southern California (NDC, Bohemian-Don W. Snyder-Western, William George-Young's Market, Simon Levi, Southern Wines & Spirits, and Drummond Distributing), six in Northern California (Rathjen, Foremost-McKesson, Juilliard, Sobel, Terminal and Joseph George), and one in the Central Valley (Berberian) account for approximately 70% of wholesale volume in the State (see Exhibit B). Under his franchise agreement, each franchisee is also confined to a particular marketing area.

The major distillers promulgate to their franchisees lists of "suggested" prices for resale to the retailer. Exhibit C

is a collection of documents which petitioners are informed and believe are typical suggested price circulars. The franchised distributors rigorously adhere to the suggested retail prices to within a few cents per case. Thus at present and for many years past wholesale prices on each brand have been uniform among the various franchisees. See Exhibit D which is a true and correct copy of 39 *Patterson's California Beverage Journal* 281A-316A (No. 1, Sept. 1979). This periodical is a standard industry source for price data. All franchised distributors use the base or "front line" prices indicated in this exhibit which are, in fact, the current suggested prices. For example, Exhibit E, which is a true and correct copy of excerpts from 39 *Patterson's California Beverage Journal* (No. 1, Sept. 1979) and *Beverage Industry News Merchandiser* (Sept. 1979), demonstrates that for the ten leading brands indicated in Exhibit A-1, the franchised distributors sell at virtually identical front line prices and exactly the same volume discounts.

The only true price competition at the wholesale level comes from independent wholesalers like petitioners who sell to retailers at prices significantly below the distillers' suggested prices. The cost to the independent wholesalers is several dollars per case above that paid by the franchisees (because of the Oklahoma jobber's markup and additional freight). The independents must also pay cash while the franchisees are generally given liberal credit terms by the distillers. Despite this higher cost per case, the independents sell cases to the retailers at a net price which is $2.00 to $10.00 below the suggested prices charged by the franchisees. Exhs. D, E & G. Exhibit G is a true and correct copy of Petitioner Norman Williams Co.'s price postings. Price competition from the independents has produced a reduction in the "suggested" wholesale prices over the last year in many fast-moving brands.

After A.B. 499 was passed by the legislature, petitioners sought and were refused authorization from the major distillers to import their brands of distilled spirits. See Exhibit F, which is a true and correct copy of letters by wholesaler petitioners to the major distillers and rejections received in reply. Accordingly, petitioners will be foreclosed, beginning January 1, 1980, from importing major nationally advertised brands of liquor, in other words, substantially the entire market.

Exclusion of petitioners from the importation of major brand distilled spirts will have the effect of limiting importation to the presently franchised distributors. Since these distributors all adhere to the resale prices suggested by the distillers and since petitioners are the only importers which compete in price, A.B. 499 will result in the elimination of intrabrand price competition at the wholesale level. Retailers' costs will go up since they will only be able to obtain liquor at the suggested prices.

4. *Basis for Relief*

Unless this Court restrains and prohibits Respondent from enforcing AB 499, Respondent will have a clear and mandatory duty to enforce this unconstitutional statute on January 1, 1980. Since the major distillers have refused to give petitioners permission to import, Respondent will be obliged to commence disciplinary proceedings against petitioners if they continue to import.

Petitioners' constitutional rights will be violated if this statute is enforced against them. First, A.B. 499 improperly delegates to private parties the State's exclusive power to license the importation of alcoholic beverages into the State. It is not enough that an importer be licensed by the State. To import on any commercially significant scale, he must also be authorized to import a nationally advertised brand

by one of the big distilling companies. Since the big distillers in substance have veto power over the licensing process, the statute delegates the power to regulate importation to the distillers. Such delegation violates Article 20, Section 22 of the California Constitution which expressly prohibits any delegation of the power to regulate the importation of alcoholic beverages. See attached Memorandum of Points and Authorities ("Memo"), pp. 20-28. Second, even in the absence of such an express constitutional provision prohibiting delegation, A.B. 499 would be an improper delegation since it fails to specify any standards for the exercise of the delegated power. Permission to import is committed to the unfettered discretion of the distillers with no procedure for reviewing their decisions. Accordingly, the statute denies petitioners both procedural and substantive due process in violation of Article 1, Section 7 of the California Constitution and the 5th and 14th Amendments to the United States Constitution. See Memo, pp. 28-34.

Third, the statute is preempted by the federal antitrust laws in that it purports to authorize and obliges the State to enforce privately imposed restrictions on interstate commerce which are violative of the Sherman Antitrust act. Specifically, A.B. 499 gives the big distilling interests the outright power to prohibit interstate movement of goods legally obtained by and belonging to others. The statute thus authorizes the most fundamental and unreasonable restraint on interstate commerce imaginable, i.e., the naked power to prohibit commerce by one's competitors. The statute further authorizes and condones a restraint on trade equivalent in restrictive power to a group boycott, which is *per se* illegal. (See Memo, pp. 12-13)

Fourth, the statute deprives petitioners of the equal protection of the laws as guaranteed by Article 1, Section 7 of the California Constitution and the 14th Amendment to the

United States Constitution by discriminating, without any rational basis, between importers who are "authorized" by the distillers and importers who are not. See Memo, pp. 34-42.

Petitioners have a clear, present, and substantial right to stay Respondent's enforcement of Business & Professions Code § 23672 as amended by Assembly Bill 499 prior to its effective date of January 1, 1980 because the statute, as amended, is unconstitutional on its face and petitioners have already been refused authorization to act as "authorized importers". It is therefore unnecessary for this Court to wait to determine how the statute is enforced.

5. *Inadequacy of Other Remedies*

Petitioners have no adequate administrative remedy or remedy at law. To require petitioners to violate the statute and face administrative and possible criminal sanctions to test its validity does not afford petitioners an adequate administrative or legal remedy. Petitioners have, moreover, already sought and been refused authorization from the major distillers to act as importers of their brands. The statute provides them with no administrative remedy for review of this private action.

Administrative proceedings before Respondent for violation of the statute will not afford petitioners an adequate remedy because the state Constitution prohibits an administrative officer such as Respondent from declaring a statute unenforceable or refusing to enforce it on the basis of unconstitutionality unless an appellate court has first made a determination that such statute is unconstitutional. Constitution Article 3, § 3.5. Accordingly if a petitioner violates A.B. 499 in a test case to determine its constitutionality, he would be subjected to license revocation proceedings before an administrative body which is powerless to deter-

mine the constitutionality of the statute. Respondent could do nothing but impose a penalty for violation of the statute.

Neither would the petitioners have a remedy before the Alcoholic Beverage Control Appeals Board, which has already taken the position that Article 3, § 3.5 deprives it of the power to declare a statute unconstitutional. *Capiscean Corporation v. Alcoholic Beverage Control Appeals Board,* 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979).

Requiring petitioners first to violate the statute to test its validity may also expose them to possible criminal sanctions. Under Business & Professions Code § 23670, violation of Business & Professions Code § 23672 (which A.B. 499 amends) is a misdemeanor. Under Business & Professions Code § 25617, each violation is punishable by a fine of not more than $500.00 or by imprisonment in the county jail for not more than six months or by both. Goods imported in violation of the statute may also be subject to the extremely costly penalty of confiscation by Respondent. Business & Professions Code § 25350.

6. *Irreparable Damage Threatened*

As a result of the threatened future actions of Respondent as described above, petitioners will sustain irreparable damage to their businesses and business relationships unless Respondent is restrained by this Court. Enforcement of Business & Professions Code § 23672 as amended by Assembly Bill 499 would destroy petitioners' businesses and business relationships with out-of-state suppliers, destroy a chain of distribution established by the petitioners, and effectively exclude petitioners from substantially all of the packaged distilled spirits importing and wholesaling market.

7. *Reason For Original Application to Higher Court*

In accordance with California Rules of Court 56(a)(1), petitioners seek extraordinary relief from this Court in the first instance because, in addition to the matters set out above in Paragraphs 1 through 6, the following circumstances render it proper and necessary that a writ issue from this Court:

The constitutionality of a statute of statewide effect is involved. The enforcement of the statute is likely to have an immediate adverse effect on the public welfare statewide because the predictable result of the statute, in eliminating petitioners from the importation of major brand distilled spirits, is an abrupt raising of prices which consumers throughout the State must pay for alcoholic beverages. If this matter is not resolved prior to the effective date of the statute (January 1, 1980), consumers will be forced to pay these inflated prices over the entire period of protracted litigation required to resolve the constitutionality of this statute in the lower courts. This matter therefore involves significant public issues which require prompt resolution.

Enforcement of the statute commencing January 1, 1980 will also jeopardize businesses and business relationships established by petitioners and others which are largely responsible for a lowering of liquor prices throughout the State over the last year since this Court's decision in *Rice*. The wholesaler petitioners in this action, who could not engage in the importation of major brand liquor prior to the *Rice* decision, have established valuable business relationships not only with suppliers of liquor in Oklahoma but also with numerous retailers in California. Enforcement of the statute would destroy their businesses and disrupt a whole chain of distribution which may not easily be set up again.

A trial on the facts in a lower court is unnecessary for the resolution of the issues presented. As demonstrated above, A.B. 499 is unconstitutional on its face. In particular, the improper delegation, deprivation of due process and equal protection attacks on the statute can be resolved in petitioners' favor merely by reference to well established legal authorities. Furthermore, this Court has already evaluated and rejected in *Rice, supra,* the numerous factual arguments based on the erroneous premise that high liquor prices are beneficial to the public welfare.

The matters involved herein raise issues which are likely to recur and should receive uniform resolution throughout the State.

WHEREFORE, petitioners pray that:

1. An alternative writ of mandate and/or prohibition and/or certiorari issue under the seal of this Court commanding respondent BAXTER RICE, Director, Department of Alcoholic Beverage Control, to desist and refrain from taking any action or proceedings to enforce Business & Professions Code § 23672 as amended by Assembly Bill 499 until further order of this Court, and directing and requiring respondent to show cause before this Court, at a time and place then or thereafter specified by Court order, why he should not be absolutely and forever restrained from enforcing § 23672 as amended by A.B. 499 or to show cause before this Court at a time and place then or thereafter specified, why a peremptory writ should not issue.

2. On the return of the alternative writ and the hearing of this petition, this Court issue its peremptory writ of mandate and/or prohibition and/or certiorari absolutely and forever restraining respondent from enforcing Business & Professions Code § 23672 as amended by Assembly Bill 499.

3. Petitioners recover costs and attorneys' fees in this action.

4. The Court grant such other relief as is just and proper.

Dated: November 15, 1979.

Respectfully submitted,

FELDMAN, WALDMAN & KLINE

By /s George G. Weickhardt

George G. Weickhardt

Attorneys for Petitioners

EXHIBIT A

4. Of Exhibits in Support of Petition for Writ of Mandate and/or in the Alternative, Prohibition and/or Certiorari, with Supporting Memorandum of Points and Authorities, Refiled November 1, 1979, in California Court of Appeal after Transfer from Supreme Court of California.

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

Civil Case No. 24082

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation d/b/a GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE d/b/a SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE d/b/a TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, FR. and SHIRLEY D. KIRBY d/b/a HOUSE OF FINE SPIRITS

Petitioners,

vs.

BAXTER RICE, Director, Department of Alcoholic Beverage Control,

Respondent.

FELDMAN, WALDMAN & KLINE
LELAND R. SELNA, JR.
MAX LIEBERMAN
GEORGE G. WEICKHARDT
27th Floor, Russ Building
235 Montgomery Street
San Francisco, CA 94104
[415] 981-1300
Attorneys for Petitioners

EXHIBIT A

By computation of brand totals from A-5, it can be determined that Seagram, National, Schenley, Heublein, Hiram Walker, and Brown-Forman accounted for 60% of total national consumption in 1977 of approximately 158,000,000-161,000,000 cases (from Exhibit A-2 to A-3). The following national ranks and market shares were also derived from Exhibit A-5.

Rank	Company	Estimated Market Share
1	Seagram	19.9%
2	Heublein	10.0
3	Hiram Walker*	9.0
4	National Distillers	8.8
5	Schenley	8.1
6	Brown-Forman**	4.8
7	Bacardi	4.0
8	Fleischmann***	3.7
9	Somerset	3.4
10	Gordon/Renfield	3.0
11	Jim Beam	2.8
12	Glenmore	2.6
13	Ligett Group	2.4
14	Buckingham	1.6
15	Foremost-McKesson	1.0
		85.1%

* includes assigned agency brands
** includes Southern Comfort acquisition
*** includes Inver House acquisition

It can also be determined from Exhibit A-5 that nationally advertised brands produced by eleven other companies account for an additional 8,962,000 cases or approximately an additional six percent (6%) of national consumption. Nationally advertised brands accordingly account for approximately 91% of national consumption.

1978's gainers and losers in the liquor business

	Brand	Sales (thousands of cases) 1978	1977	Change Percent	Marketer	Type
1	Bacardi	6,200	5,000	24.%	Bacardi	Rum
	Seagram's 7 Crown	6,200	6,300	–1.6	Seagram	Blend
3	Smirnoff	6,150	5,875	4.7	Heublein	Vodka
4	Seagram's VO	3,875	3,775	2.8	Seagram	Canadian
5	Canadian Club	3,675	3,850	.07	Walker	Canadian
6	Jim Beam	2,750	2,675	2.8	Beam	Bourbon
7	J&B	2,650	2,525	5.0	Paddington	Scotch
8	Gordon's Gin	2,600	2,700	–3.7	Renfield	Gin
9	Windsor Supreme	2,475	2,375	4.2	National	Canadian
10	Seagram's Gin	2,350	2,050	14.6	Seagram	Gin
11	Canadian Mist	2,300	2,000	15.0	Brown-Forman	Canadian
12	Popov	2,250	1,825	23.3	Heublein	Vodka
13	Gilbey's Gin	2,225	2,175	2.3	National	Gin
14	Dewar's	2,200	2,150	2.3	Schenley	Scotch
15	Cutty Sark	2,150	2,100	2.4	Buckingham	Scotch
16	Black Velvet	1,900	1,575	20.6	Heublein	Canadian
17	Jack Daniel's	1,875	1,525	23.0	Brown-Forman	Tennessee
18	Early Times	1,800	1,750	2.9	Brown-Forman	Bourbon
19	Kessler	1,725	1,800	–4.2	Seagram	Blend
20	Ancient Age	1,675	1,775	–5.8	Schenley	Bourbon
	Johnnie Walker Red	1,675	1,550	8.1	Somerset	Scotch
22	Gordon's Vodka	1,650	1,625	1.6	Renfield	Vodka
23	Christian Bros.	1,575	1,550	1.8	Fromm & Sichel	Brandy
24	Beefeater	1,550	1,425	8.8	Kobrand	Gin
25	Calvert Extra	1,475	1,600	–7.8	Seagram	Blend
	Ten High	1,475	1,425	3.5	Walker	Bourbon
27	Gilbey's Vodka	1,400	1,350	3.7	National	Vodka
28	Fleischmann's Gin	1,375	1,350	1.9	Fleischmann	Gin
29	Imperial	1,175	1,225	–4.1	Walker	Blend
	Wolfschmidt	1,175	1,225	–4.1	Seagram	Vodka
31	Kamchatka	1,150	1,000	15.0	National	Vodka
	Southern Comfort	1,150	1,025	12.2	Brown-Forman	Specialty
33	Kahlua	1,100	850	29.4	Walker	Specialty
34	Fleischmann's Pref'd	1,075	1,175	–8.5	Fleischmann	Blend
	Old Crow	1,075	1,050	2.4	National	Bourbon
39	Chivas Regal	1,050	1,000	5.0	Seagram	Scotch
	Old Grand-Dad	1,050	1,025	2.4	National	Bourbon

38	Lord Calvert Canadian	1,000	925	8.1	Seagram	Canadian
39	Crown Russe	875	950	–7.0	Seagram	Vodka
40	Schenley Vodka	825	950	–13.2	Schenley	Vodka
41	MacNaughton's	800	775	3.2	Schenley	Canadian
	Relska	800	875	–8.8	Heublein	Vodka
43	Old Charter	775	825	–6.1	Schenley	Bourbon
	Old Forester	775	725	6.9	Brown-Forman	Bourbon
45	Old Taylor	675	725	–8.9	National	Bourbon
	Ronrico	675	600	12.5	Seagram	Rum
47	Tanqueray	700	600	16.0	Somerset	Gin
48	Inver House	650	600	8.3	Publicker	Scotch
49	Jose Cuervo	625	575	8.7	Heublein	Tequila
	Skol	625	500	25.0	Publicker	Vodka
51	Walker Vodka	600	525	4.3	Walker	Vodka
	Amaretto Di Saronno	500	—	—	Glenmore	Specialty
53	Johnnie Walker Black	450	525	14.8	Somerset	Scotch
	Nikolai	850	600	–8.3	Seagram	Vodka
	Crown Royal	550	600	10.0	Seagram	Canadian
56	Castillo	525	—	—	Bacardi	Rum
	Canadian LTD	525	—	—	Fleischmann	Canadian
	J. W. Dant	525	600	–12.5	Schenley	Bourbon
	Jacquin	525	—	—	Jacquin	Vodka
	Mr. Boston	525	625	–16.0	Glenmore	Vodka
	Tvarsoki	525	575	–8.7	American	Vodka
	Wild Turkey	525	—	—	Austin-Nichols	Bourbon
63	Ballantine	500	500	—	21 Brands	Scotch
	Passport	500	575	–13.0	Seagram	Scotch

Business Week April 2, 1979

Consumption of Total Distilled Spirits — 1971 to 1978 (In Cases)* Calendar Years

Region	1971	1972	1973	1974	1975	1976	1977	1978
N.E.	10,740,553	11,163,746	11,504,419	11,682,953	11,567,041	11,413,866	11,536,118	11,713,478
Me.	610,362	649,128	674,564	714,047	721,193	761,856	803,218	830,099
N.H.	1,413,086	1,522,559	1,564,388	1,549,879	1,629,861	1,612,936	1,702,365	1,761,635
Vt.	507,790	556,328	567,295	567,824	574,635	564,033	537,428	552,553
Mass.	4,866,688	5,046,133	5,296,057	5,414,245	5,248,961	5,128,854	5,118,540	5,201,489
R.I.	571,257	698,694	721,720	738,684	746,773	729,625	721,308	713,113
Conn.	2,671,370	2,690,904	2,680,395	2,698,274	2,645,618	2,616,562	2,653,259	2,654,589
M.A.	28,730,318	28,076,189	28,974,331	28,668,518	28,341,595	27,967,677	27,649,864	27,446,823
N.Y.	16,193,513	15,225,398	16,147,341	15,888,768	15,688,912	15,436,114	15,127,680	14,990,845
N.J.	6,096,749	6,323,167	6,182,127	6,117,564	5,982,590	5,888,982	5,888,394	5,805,130
Pa.	6,440,056	6,527,624	6,644,863	6,662,186	6,670,093	6,642,581	6,633,790	6,650,848
E.N.C.	26,229,489	27,179,503	27,550,312	27,911,255	27,963,247	27,711,849	28,277,377	28,590,316
Ohio	5,491,749	5,561,245	5,692,002	5,702,610	5,619,118	5,544,416	5,641,687	5,754,932
Ind.	2,170,942	2,336,935	2,299,803	2,428,037	2,452,975	2,479,759	2,871,218	2,814,553
Ill.	9,280,887	9,449,306	9,585,559	9,602,787	9,756,427	9,492,947	9,341,848	9,185,159
Mich.	6,087,471	6,408,322	6,457,175	6,578,254	6,587,509	6,684,350	6,784,135	7,059,700
Wis.	3,198,440	3,423,695	3,515,773	3,599,567	3,547,218	3,510,377	3,638,489	3,775,973
W.N.C.	9,273,434	9,417,705	9,546,080	9,996,358	9,981,884	9,574,916	9,685,956	9,905,149
Minn.	2,682,330	2,578,932	2,717,740	2,800,969	2,742,116	2,544,669	2,550,657	2,541,841
Ia.	1,301,299	1,332,782	1,420,413	1,480,109	1,521,998	1,557,127	1,581,852	1,583,234
Mo.	2,680,008	2,750,056	2,566,442	2,762,557	2,720,451	2,506,723	2,511,656	2,674,840
N.D.	399,511	468,183	475,396	492,608	509,628	499,994	500,915	508,810
S.D.	372,625	365,255	419,784	420,868	429,047	456,744	486,086	483,877
Neb.	886,656	934,413	919,578	952,183	973,450	933,807	946,078	952,682
Kan.	951,005	988,084	1,026,727	1,087,064	1,085,194	1,075,852	1,108,712	1,159,865
S.A.	24,274,908	25,598,037	25,656,356	26,731,786	26,914,140	27,808,670	28,265,910	29,454,395
Del.	582,437	540,047	555,437	544,661	546,946	480,425	546,994	555,015
Md.	3,493,436	3,658,893	3,771,608	3,894,866	3,993,221	4,029,432	4,056,806	4,086,513
D.C.	2,118,925	2,061,923	1,908,025	1,822,068	1,782,995	1,695,551	1,572,649	1,502,792
Va.	2,975,862	3,068,071	3,197,431	3,220,926	3,234,489	3,266,696	3,371,235	3,506,707
W.Va.	835,751	870,158	897,850	938,583	997,609	1,013,325	1,032,419	1,048,972
N.C.	2,845,724	2,919,045	2,981,838	3,046,791	3,068,800	3,144,330	3,217,572	3,373,843
S.C.	1,742,299	1,900,284	1,943,772	2,118,086	2,070,411	2,182,863	2,141,659	2,388,802
Ga.	2,912,775	3,204,157	2,983,402	3,233,465	3,490,756	3,761,324	3,782,140	4,013,760
Fla.	6,767,699	7,375,459	7,416,993	7,912,340	7,728,913	8,234,724	8,544,436	8,977,991
E.S.C.	5,570,941	6,004,737	6,311,675	6,575,142	6,876,080	7,070,142	7,319,975	7,626,119
Ky.	1,607,098	1,666,207	1,705,135	1,748,813	1,787,234	1,771,136	1,808,027	1,822,564
Tenn.	1,414,382	1,580,012	1,746,271	1,822,651	1,905,960	1,997,993	2,044,056	2,131,162
Ala.	1,541,228	1,672,334	1,730,860	1,794,19[illegible]	1,908,871	1,966,216	2,053,498	2,167,003
Miss.	1,008,233	1,086,184	1,129,409	1,209,484	1,274,015	1,334,797	1,414,394	1,505,390

W.S.C.	9,669,807	9,755,062	10,048,464	10,482,433	11,401,667	11,487,363	12,389,613	13,881,300
Ark.	661,189	727,429	790,733	847,538	850,834	911,461	912,618	1,079,677
La.	2,304,928	2,361,116	2,302,995	2,331,714	2,690,745	2,758,307	2,927,731	3,235,001
Tex.	5,394,022	5,414,083	5,579,201	5,954,308	6,406,492	6,371,640	7,044,567	7,911,062
Okla.	1,309,668	1,252,434	1,375,535	1,348,873	1,453,596	1,445,955	1,504,697	1,655,560
M.	5,657,414	6,058,627	6,432,607	6,908,536	7,172,689	7,803,908	8,097,904	8,319,178
Mont.	460,805	490,478	512,006	533,433	555,796	572,178	606,986	613,838
Ida.	367,223	386,476	388,602	415,560	443,247	450.940	483,499	514,159
Wyo.	250,480	267,645	290,933	318,306	336,646	350,964	382,251	414,396
Colo.	1,620,586	1,720,131	1,852,967	1,980,700	2,036,928	2,363,203	2,182,136	2,215,458
N.M.	546,089	539,919	498,274	563,465	488,928	637,813	730,595	742,380
Ariz.	1,079,169	1,128,475	1,227,550	1,372,749	1,391,430	1,421,260	1,558,053	1,623,830
Utah	380,160	405,546	426,031	428,146	453,279	471,336	493,787	524,048
Nev.	952,902	1,119,957	1,236,244	1,296,177	1,466,435	1,536,214	1,660,597	1,670,569
P.	21,727,050	22,307,058	22,997,415	23,782,399	24,604,082	24,923,232	25,543,267	27,064,501
Wash.	2,386,308	2,344,824	2,455,547	2,609,003	2,735,699	2,815,362	2,993,403	3,163,288
Ore.	1,293,733	1,355,547	1,436,961	1,473,882	1,529,177	1,561,022	1,677,864	1,764,579
Calif.	17,203,832	17,645,910	18,021,843	18,593,427	19,097,670	19,269,385	19,654,790	20,936,126
Alas.	400,452	414,932	417,874	391,835	518,954	535,192	500,864	470,881
H.I	442,725	545,845	665,190	714,252	722,582	742,271	716,346	729,627
U.S.	141,873,914	145,560,664	149,021,659	152,739,380	154,822,425	155,761,623	158,765,984	164,001,259

*Estimated.

SOURCE: NABCA, DISCUS Reports and Liquor Handbook estimates.

Estimated Distilled Spirits Entering Trade Channels
Calendar Years 1977 vs. 1978
(In Wine Gallons)

Class and Type	Net Totals 1977	% of Total	Net Totals 1978	% of Total	% Change
American Whiskey					
Bonded	3,342,710	0.8	3,314,870	0.7	− 0.8
Straights	61,834,249	14.0	64,662,019	13.7	+ 4.6
Straight Blends	1,029,915	0.2	1,270,555	0.3	+ 23.4
100% Lights	236,622	0.1	233,247	−	− 1.4
Blends	51,423,581	11.5	48,857,148	10.4	− 5.0
Total American Whiskey	117,867,077	26.7	118,337,839	25.1	+ 0.4
Imported Whisky					
Scotch (C)	52,195,046	11.8	56,757,046	12.1	+ 8.7
Canadian	48,140,564	10.9	53,640,566	11.4	+ 11.4
Irish	411,992	0.1	672,332	0.1	− 63.2
Total Imported Whisky (A)	100,747,602	22.8	111,069,944	23.5	+ 10.2
Total All Whiskey	218,614,679	49.5	229,407,783	48.6	+ 4.9
Gin					
Domestic	38,730,172	8.8	38,497,099	8.2	− 0.6
Imported	5,302,616	1.2	6,258,488	1.3	+ 18.0
Total Gin	44,032,788	10.0	44,755,587	9.5	+ 1.6
Rum					
Puerto Rican (B)	18,531,829	4.2	22,211,384	4.7	+ 19.9
Virgin Islands (B)	982,988	0.2	1,275,820	0.3	+ 29.8
Other Domestic	2,462,919	0.6	2,776,166	0.6	+ 12.7
Total Domestic Rum	21,977,736	5.0	26,263,370	5.6	+ 19.5
Imported Rum	741,191	0.2	891,164	0.2	+ 20.2
Total Rum	22,718,927	5.2	27,154,534	5.8	+ 19.5
Brandy					
Domestic	13,439,467	3.0	13,459,026	2.9	− 0.1
Imported	3,389,007	0.8	4,461,359	0.9	+ 31.6
Total Brandy	16,828,474	3.8	17,920,385	3.8	+ 6.5
Cordials and Specialties					
Domestic	25,500,349	5.8	30,165,058	6.4	+ 18.3
Imported	5,821,592	1.3	7,059,168	1.5	− 21.3
Total Cordials and Specialties	31,321,941	7.1	37,224,226	7.9	+ 18.8
Vodka					
Domestic	90,638,885	20.5	94,601,157	20.0	+ 4.4
Imported	101,527	−	79,942	−	− 21.3

Total Vodka	90,740,412	20.5	94,681,099	20.0	+ 4.3
Tequila	6,305,002	1.4	6,689,007	1.4	+ 6.1
Prepared Cocktails	9,893,720	2.2	12,094,292	2.6	+ 22.2
Not Elsewhere Specified (D)	1,364,434	0.3	1,938,377	0.4	+ 42.1
Total Domestic Distilled Spirits (A)	318,263,378	72.0	333,629,033	70.7	+ 4.8
Total Imported Distilled Spirits	123,556,999	28.0	138,236,257	29.3	− 11.9
Total All Distilled Spirits	441,820,377	100.0	471,865,290	100.0	+ 6.8

(A) Includes imported products bottled in U.S.
(B) Puerto Rican Rum converted to W.G. at 80 Pr.
Virgin Island Rum converted to W.G. at 80 Pr.
(C) Includes Irish Whiskey from Northern Ireland.
(D) Includes Spirits N.E.S., Bitters and Neutral Spirits, etc.

SOURCE: Calculated from DISCUS Reports

Retail Prices of Leading Brands—Fifth/750 Milliliter Sizes (January, 1979)

State	Blend	Straight	Bond	Scotch	Canadian	Gin	Rum	Brandy	Vodka
Control:	Seagram 7 Crown (Seagram)	Old Crow (National)	Old Forester (Brown-Forman)	Dewar's (Schenley)	Seagram V.O. (Seagram)	Gordon's (Renfield)	Bacardi (Bacardi)	Christian Brothers (Fromm & Sichel)	Smirnoff 80° (Heublein)
Alabama	$5.85	$5.20	$10.50Q	$9.15	$8.20	$5.25	$ 6.55Q	$6.80	$5.60
Idaho	5.85	5.45	–	9.50	8.05	5.35	5.50	6.15	5.65
Iowa	5.30	4.90	–	8.70	7.40	4.70	5.10	6.56	5.10
Maine	5.85	5.35	–	9.25	8.00	5.15	5.50	6.70	5.45
Michigan	5.42	5.05	8.16	8.73	7.55	4.25	5.18	6.12	5.18
Mississippi	N.A.	N.A.	N.A.	N.A.	N.A.	4.55	N.A.	6.49	4.31
Montana	5.90	5.50	–	9.65	8.20	5.30	5.65	N.A.	5.55
New Hampshire	5.70	4.25	–	7.15	6.25	4.00	4.45	5.20	4.35
N. Carolina	5.40	5.00	8.05	8.60	7.55	4.85	5.15	6.20	5.25
Ohio	5.75	5.40	7.10	9.10	7.85	5.25	5.55**	6.45	5.60
Oregon	6.35	5.90	9.50	9.95	8.85	5.65	6.10	6.90	5.85
Pennsylvania	5.99	5.59	9.18	9.50	8.45	5.37	6.88Q	6.86	5.80
Utah	5.85	5.45	–	9.50	8.10	5.25	5.50	6.40	5.55
Vermont	5.10	4.65	–	7.00	6.15	4.50	4.95	5.90	4.80
Virginia	5.10	4.75	7.65	8.20	7.15	4.55	4.85	6.25	4.95
Washington	6.60	5.80	9.35	9.65	8.80	6.05	6.40	6.60	6.25
W. Virginia	5.47	5.05	8.28	8.92	7.64	4.88	5.20	6.25	5.25
Wyoming	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	4.69

Open:									
Alaska	N.A.	N.A.	N.A.	10.25	N.A.	N.A.	N.A.	N.A.	5.47
Arizona	N.A.	N.A	N.A.	8.75	N.A.	4.99	5.65	5.79	5.57
Arkansas	5.61	5.30	8.50	9.60	7.55	5.00	5.90	6.75	5.66
California	N.A.	N.A.	8.29	9.25	N.A.	5.29	5.29	6.29	6.60
Colorado	N.A.	N.A.	N.A.	8.19	N.A.	4.19	4.39	N.A.	5.30
Connecticut	5.75	5.89	7.89	8.39	7.55	4.99	5.59	6.25	5.79
Delaware	5.75	5.23	7.95	8.25	7.41	4.95	5.45	6.20	5.30
Dist. of Columbia	N.A.	N.A.	N.A.	7.79	N.A.	4.47	N.A.	5.99	N.A.
Florida	6.70	5.39**	N.A.	9.65**	8,40	5.19**	6.35**	6.49	6.65
Georgia	6.10**	5.49**	8.99**	8.99	7.95**	4.49**	5.99**	6.49	6.16**
Hawaii	6.49	N.A.	9.25	10.25	8.99	5.49	5.69	6.85	6.19
Illinois	N.A.	4.59	N.A.	7.19	N.A.	4.39	4.69	5.39	4.92
Indiana	N.A.	5.39	8.38**	8.27	N.A.	4.49	5.98	5.99	5.70
Kansas	N.A.	5.43	8.18	9.03	N.A.	5.26	5.81	6.49	5.20
Kentucky	5.55	5.24	7.89	8.75	7.40	4.99	5.38	5.99	5.19
Louisiana	4.79	4.51	6.99**	7.88	6.59	4.39	4.59	N.A.	4.99
Maryland	5.45	4.84	7.69	8.52	7.30	4.69	5.10	5.69	5.05
Massachusetts	6.09	5.79	8.69	9.10	8.10	5.59	5.89	6.59	6.09
Minnesota	N.A.	4.79	N.A.	6.99	N.A.	4.99	5.50	5.69	5.25
Missouri	N.A.	4.69	7.70**	7.69	N.A.	4.15	4.79	6.09	4.99
Nebraska	N.A.	4.49	7.44	7.95	N.A.	4.52	4.99	5.79	5.29
Nevada	N.A.	N.A.	N.A.	9.29	N.A.	4.89	5.50	6.15	5.39
New Jersey	6.19	5.80	8.49	8.99	8.25	5.69	5.99	6.60	5.75
New Mexico	N.A.	N.A.	N.A.	9.75	N.A.	4.29	4.29	5.79	5.15
New York	6.10	4.95	7.99**	8.99	8.20	5.49	5.14	5.89	6.07
N. Dakota	N.A.	4.29	8.79	8.43	N.A.	4.69	5.29	6.19	5.69
Oklahoma	N.A.	4.19	5.95	6.97	N.A.	4.30	4.39	5.25	4.32
Rhode Island	5.65	5.40	8.25	8.79	7.59	5.15	5.45	6.13	5.60
S. Carolina	5.84	5.70	8.32	8.95	7.64	5.25	5.95	6.20	5.91
S. Dakota	5.95	5.60	8.25	9.19	7.99	4.79	5.78	5.89	5.82
Tennessee	5.95	5.19	8.75**	9.39	7.81**	5.79	6.19	6.79	6.35
Texas	N.A.	N.A.	N.A.	7.29	N.A.	4.69	5.79**	6.29	5.65**
Wisconsin	N.A.	4.59	7.26**	7.89	N.A.	4.49	5.25	5.69	5.10

SOURCE: Company data, prices quoted are those reported by brand-owners from informal survey data as being prevalent in the respective markets.

*Sectional Price.

N.A. – Not Available.

Q–Quart size.

AVERAGES:			8.24	8.72		4.92	5.46	6.21	5.47

—37—

BARRON'S

No Three Martinis

Domestic Consumption of Liquor
Scores a Very Small Gain

By JOHN C. MAXWELL JR.

[Initial Two Paragraphs Omitted in Printing]

The industry's flat sales for 1977 underscore the trend toward moderation in American drinking. And the 8%-10% of the population that, by federal estimates, smokes marijuana, is helping keep the cork on a lot of bottles. Even so, 36 brands sold over a million three-gallon cases last year, one brand more than in 1976.

One label, National Distillers' Old Crow, dropped out of the million-case lineup, while two others, Schenley Vodka and Lord Calvert Canadian, joined the ranks. Seagram's 7 Crown continued as the nation's best seller, though sales of that blend were flat compared with the year before.

But the big story of '77 was the big boost enjoyed by Bacardi; volume jumped by almost a million cases, by our count the largest gain in industry history. The brand passed Seagram's V.O., to become the third-ranking label in the U.S., and will soon be giving Heublein's Smirnoff vodka a run for second place. As Table II illustrates, rum is the fastest growing drink, and Bacardi holds an 8-to-1 lead in that category over second-ranking Seagram's Ron Rico.

There were other changes in rank among the leaders. National Distillers' Windsor Supreme jumped to tenth place from fifteenth in 1976. Dewar's Scotch, from Schenley, moved to eleventh and Seagram's Gin to twelfth, each climbing one notch. National's Gilbey's gin fell to thirteenth from tenth and Calvert's Kessler dropped from eleventh to fourteenth.

To lend a measure of validity to the hand-wringing over martini lunches, vodka continued to be the No. 1 seller, with consumption up by an estimated 3.2%. Heublein's Popov brand advanced by more than 20%, coming close to tying Gordon's for the second spot. Popov's longer established stablemate, Smirnoff, boosted sales by 4.6%. Those two brands, plus a third Heublein label, Relska, give the company continued dominance in the growing vodka market.

There remains a conservative school of drinking, however, that believes the only real martini is made from gin. That category registered a modest 2.2% gain last year. But Seagram's did post a 20% gain, one of the biggest jumps among the majors in the industry. Korbrand's Beefeater moved into fourth position, bypassing Fleischmann's.

American Brands' Jim Beam retained the lead in the bourbon market, outselling Brown-Forman's Early Times by almost 2-to-1. Overall, bourbon sales continued to shrink. Jack Daniel's black label was one of the few brands bucking the trend; Brown-Forman had to allocate the whiskey.

Flat Scotch, Declining Blends

Scotch volume was relatively flat. Liggett Group's J&B held its lead. Buckingham's Cutty Sark ran a close second, backed by a $1 million-a-month ad campaign launched early last year. Seagram continued to dominate the blends with the three top products, but no label posted a gain and the category declined by an estimated 4.7%.

Seagram's V.O, again led the Canadian whiskies, though Walker's Canadian Club ran a close second. Sales of both products were up moderately, though volume for the category was relatively flat.

Tequila sales continue at about two million cases a year. Heublein's Jose Cuervo was again the largest selling brand, up 6% from '76 to 545,000 cases.

Irish Growth

Although sake is still a relatively small item in the catalog of spirits, volume has expanded rapidly, reaching somewhat more than 210,000 cases in 1977, vs. 165,000 in '76. Heublein's Kiku and Taru together came close to selling 21,500 cases last year, up from 16,000. Continued gains in this Japanese wine could be propelled by expanding interest in Oriental dishes and the general growth in wine drinking.

Natives of the Emerald Isle like to describe Scotch as "watered Irish," an unsurprising bit of booze chauvinism. What's more surprising is the rapid growth of Irish whiskey sales in the U.S. Volume is still not high enough for inclusion in Table II, but consumption has doubled since 1971, and last year reached close to 200,000 cases.

Seagram's Jameson and Brown-Forman's Bushmill have been battling for leadership, each with sales last year of around 60,000 cases. Heublein sold 35,000 cases of Tullmore Dew; Austin Nichols recorded sales of 25,000 cases of Murphy's and 8,000 cases of Paddy. American Distilling's Dumphy's, with a volume of 9,000 cases, moved up to fifth position from seventh the year before. Overall, Irish whiskey sales shot up 16% in 1977, and the industry expects further gains in '78.

TABLE I: Million-Case Sellers

Brand	1976	1977r	% Chg.
		(000's Omitted)	
7 Crown	6,700	6,700	
Smirnoff	5,615	5,575	+ 4.6
Barcardi	3,783	4,697	+24.2
V.O.	4,100	4,200	+ 2.4

Canadian Club	3,740	3,815	+ 2.0
Jim Beam	3,185	3,265	+ 2.5
Gordon's Gin	2,660	2,710	+ 1.9
J&B Rare	2,650	2,650	
Cutty Sark	2,500	2,550	+ 2.0
Windsor Supreme	2,250	2,375	+ 5.6
Dewar's	2,150	2,300	− 1.7
Seagram's Gin	1,800	2,250	+19.7
Gilbey's Gin	2,100	2,200	+ 4.8
Kessler	2,000	1,965	− 1.7
Canadian Mist	1,685	1,862	+10.5
Calvert Extra	1,800	1,745	− 3.1
Gordon's Vodka	1,690	1,730	+ 2.4
Popov	1,420	1,710	+20.4
Ancient Age	1,650	1,700	+ 3.0
Johnnie Walker Red	1,675	1,690	+ 0.8
Early Times	1,626	1,656	+ 1.8
Fleischmann Pfd.	1,600	1,520	− 5.0
Ten High	1,545	1,465	− 5.2
Christian Brothers	1,425	1,450	+ 1.7
Wolfschmidt	1,400	1,400	+ 1.7
Gilbey's Vodka	1,300	1,395	+ 4.2
Black Velvet	1,300	1,350	+ 3.8
Jack Daniels	1,339	1,344	+ 0.7
Beefeater	1,275	1,340	+ 5.1
Fleischmann Gin	1,395	1,325	− 5.0
Imperial	1,400	1,285	− 8.2
Crown Russe	1,200	1,170	− 2.5
Southern Comfort	1,005	1,117	+11.1
Schenley Vodka	1,000	1,100	+10.0
Lord Calvert Canadian	900	1,050	+16.7
Old Grand Dad	1,050	1,000	− 4.8

TABLE II 3-Gallon Case Sales by Liquor Type

1000's Omitted	1976	1977	Company
VODKA			
Smirnoff	5,615	5,875	Heublein
Gordon's	r1,690	1,730	Gordon, Renfield
Popov	1,420	1,710	Heublein
Wolfschmidt	1,400	1,400	Seagram
Gilbey's	1,300	1,375	National
Crown Russe	1,200	1,170	Calvert (S)
Schenley's	r1,000	1,100	Schenley (GA)
Relska	890	908	Heublein
Kamchatka	r900	900	National
Tolvarisch/Tvarsoki	765	770	American
Mr. Boston	700	700	Mr. Boston (G)
Nikolai	615	640	General Wine (S)
Jacquin	r620	590	Jacquin
Hiram Walker	550	580	Walker (HW)
Fleischmann Royal	520	530	Fleischmann (SB)
Skol	300	500	Publicker
White Tavern	405	415	Fleischmann (SB)
Glenmore	350	350	Glenmore (G)
Canada Dry	r400	325	Somerset (NS)
Dark Eyes	270	275	Jim Beam (AB)
J.W. Dant	N.A.	150	Schenley (GA)
BOURBON			
Jim Beam	3,185	3,265	Jim Beam (AB)
Early Times	r1,626	1,656	Brown-Forman
Ancient Age	r1,650	1,545	Schenley (GA)
Ten High	1,545	1,465	Walker (HW)
Jack Daniels (Black)	r1,335	1,344	Brown-Forman
Old Grand Dad	1,050	1,000	National
Old Crow	1,000	950	National
Old Charter	r900	r900	Schenley (GA)
J.W. Dant	800	800	Schenley (GA)
Old Forester	r655	656	Brown-Forman
Old Taylor	690	655	National
Bourbon Supreme	620	585	American
Sunny Brook	600	525	National
Heaven Hill	510	510	Heaven Hill
Bourbon Deluxe	r450	495	National
Mattingly & Moore	500	470	Calvert (S)

Walker Deluxe	455	455	Walker (HW)
I.W. Harper	r415	400	Schenley (GA)
Wild Turkey	320	385	Austin Nichols (LG)
Davis County	360	360	Fleischmann (SB)
Olde Bourbon	r365	350	Schenley (GA)
Old Kentucky Tavern	335	305	Glenmore (G)
George Dickel	r220	300	Schenley (GA)
Cabin Still	290	290	Somerset (NS)
Kentucky Gentleman	r279	258	Barton
Beam's Choice (8-yr.-old premium)	280	285	Jim Beam (AB)
Old Fitzgerald	r240	240	Somerset (NS)
Stillbrook	240	230	American
Yellowstone	225	215	Glenmore (G)
Old Hickory	250	190	Publicker
Antique Bourbon	275	185	Calvert (S)
Very Old Barton	r176	179	Barton
Weller	125	175	Somerset (NS)
Echo Spring	r160	150	Schenley (GA)
Bellows Club	150	130	National
Benchmark	125	130	Seagram (S)
Mr. Boston	140	125	Glenmore (G)
Canada Dry Bourbon	150	120	Somerset (NS)
G&W Private Stock	100	90	G&W Sales (HW)
SCOTCH			
J&B Rare	r2,650	2,650	Paddington (LG)
Cutty Sark	r2,500	2,500	Buckingham
Dewar's	r2,150	2,300	Schenley (GA)
Johnnie Walker Red	1,675	1690	Somerset (NS)
Ballantine	640	600	Foremost-McKesson
Inver House	600	600	Publicker
Passport	560	580	Calvert (S)
B&L	440	450	Park Benziger
Clan McGregor	395	395	Wm. Grant & Sons Inc.
Teacher's	425	390	Schieffelin
Usher's	r352	361	Brown-Forman
Lauder's	310	335	G&W Sales (HW)
Harvey's	300	330	Park Benziger
Vat 69	r290	330	National
King George IV	r325	300	National
Crawford's	290	295	Somerset (NS)
John Begg	r265	275	Somerset (NS)

House of Stuart	r210	198	Barton
J.W. Dant	170	195	Schenley (GA)
Grant's	185	180	Wm. Grant & Sons Inc.
White Horse	150	165	Calvert (S)
Black & White	150	140	Heublein
100 Pipers	140	140	Seagram (S)
Ambassador	r147	135	Brown-Forman
Martin VVO	r130	130	Foremost-McKesson
Dawson	125	116	Schenley (GA)
PREMIUM SCOTCH			
Chivas Regal	950	915	General Wine (S)
Johnnie Walker Black (R)	r470	510	Somerset (NS)
BLENDS			
7 Crown	6,700	6,700	Seagram (S)
Kessler	2,000	1,965	Calvert (S)
Calvert Extra	1,800	1,745	Calvert (S)
Fleischmann Pfd.	1,600	1,520	Fleischmann (SB)
Imperial	1,400	1,285	Walker (HW)
Corby's Reserve	650	580	Foremost-McKesson
Schenley Reserve	r435	410	Schenley (GA)
Carstairs	450	385	Calvert (S)
Four Roses	425	380	Calvert (S)
Old Thompson	350	350	Glenmore (G)
P.M.	350	320	National
Philadelphia Blended	N/AV	250	Publicker
Guckenheimer	230	220	American
Governors Club	255	190	Publicker
Paul Jones	180	165	Calvert (S)
Barton Reserve	r148	137	Barton
William Penn	145	120	G&W Sales (HW)
Rocking Chair	126	115	Mr. Boston (G)
Wilson	125	110	Calvert (S)
CANADIANS			
V.O.	4,100	4,200	Seagram (S)
Canadian Club	3,740	3,815	Walker (HW)
Windsor Supreme	r2,250	2,375	National
Canadian Mist	r1,685	1,862	Brown-Forman
Black Velvet	1,300	1,350	Heublein
Canadian Lord Calvert	900	1,050	Calvert (S)
MacNaughton's	r745	780	Schenley (GA)
Canadian Ltd	455	465	Fleischmann (SB)
Crown Royal	365	450	Seagram (S)

Harwood	400	400	General Wine (S)
Grande Canadian	r275	285	Schenley (GA)
Canadian Rich and Rare	240	265	Foremost-McKesson
Royal Canadian	235	230	Barclay (HW)
GIN			
Gordon's	2,660	2,710	Gordon/Renfield
Seagram	1,880	2,250	Seagram (S)
Gilbey's	2,100	2,200	National
Beefeater	1,275	1,340	Kobrand
Fleischmann	1,395	1,325	Fleischmann (SB)
Tanqueray	r630	700	Somerset (NS)
Calvert	555	565	Calvert (S)
Walker	455	455	Walker (HW)
Booth's High & Dry	385	405	DCL/Taylor
Schenley 90	r345	400	Schenley (GA)
Mr. Boston	330	330	Glenmore (G)
Burnett's	285	310	Calvert (S)
Glenmore	170	150	Glenmore (G)
Canada Dry	r198	125	Somerset (NS)
Bombay	r57	60	Liggett Group
RUM			
Bacardi	3,783	4,697	Bacardi
Ron Rico	540	575	General Wine (S)
Castillo	198	323	Bacardi
Don Q	200	215	Heublein
Palo Viejo	N/AV	135	Calvert (S)
TEQUILA			
Jose Cuervo	515	545	Heublein
Ole	r105	150	Schenley
Montezuma	r145	137	Barton Brands
El Tort	125	125	American
COCKTAILS			
Heublein Club Cocktails (cans)	860	1,030	Heublein
Heublein (full strength)	535	600	Heublein
Cocktails for Two	(e)	e560	Schenley (GA)
CORDIALS AND FLAVORED BRANDIES			
Southern Comfort	1,005	1,117	Southern Comfort
Walker	1,025	1,075	Walker (HW)
Old Mr. Boston	846	925	Mr. Boston (G)
Arrow	r820	840	Heublein
Leroux	725	765	General Wine (S)

de Kuyper	675	715	National
Jacquin	495	465	Chas. Jacquin
du Bouchett	315	310	Schenley (GA)
Chateaux	230	245	Jim Beam (AB)
Mohawk	220	220	Foremost-McKesson
Bols	r168	177	Brown-Forman
BRANDY (*Domestic*)			
Christian Brothers	1,425	1,450	Fromm & Sichel
Coronet	r430	450	Schenley (GA)
Aristocrat	350	390	California Wine Assn
Paul Masson	300	300	Brown Vintners
Mr. Boston Five Star	260	245	Mr. Boston (G)
IMPORTED SPECIALTIES			
Kahlua	r700	900	Walker (HW) Foreign
Amaretto di Saronno	270	340	Vintages (G)
Drambuie	215	218	W.A. Taylor (HW)
Galliano	210	190	Foremost-McKesson
Grand Marnier	r115	165	Carillon Importers (LG)
Benedictine and B&B	158	158	Fleischmann (SB)
Tia Maria	80	85	W.A. Taylor (HW)
Campari	65	75	Austin Nichols (LG)
Chartreuse	63	63	Scheffelin
Metaxa	53	55	Austin Nichols (LG)
Peter Heering	40	35	W.A. Taylor (HW)
VERMOUTH			
Tribuno	376	375	Tribuno Wines Inc. (C)
Stock	r305	335	Schenley (GA)
Cinzano	255	253	Schieffelin
COGNAC AND BRANDIES *(Imported)*			
Hennessey	225	250	Schieffelin
Courvoisier	210	215	W.A. Taylor (HW)
Martell	r28	70	Brown-Forman

N/A-Not Available; E-Morgan Stanley estimates.
e-Introduced. r-Revised.

5. Complaint in Intervention (of Bohemian Distributing Company), Filed December 6, 1979, in California Court of Appeal.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation d/b/a GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE d/b/a SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE d/b/a TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR. and SHIRLEY D. KIRBY d/b/a HOUSE OF FINE SPIRITS,

Petitioners,

vs. **No. 3 Civ. 19089**

BAXTER RICE, Director, Department of Alcoholic Beverage Control,

Respondent,

BOHEMIAN DISTRIBUTING COMPANY, a California corporation,

Intervenor.

1. Bohemian is a California corporation, duly organized and existing under the laws of the State of California with its principal place of business in the County of Los Angeles, State of California. Bohemian is a wholesale distributor of distilled spirits in California and is an "authorized importer" of distilled spirits under A.B. 499.

2. Bohemian seeks to intervene in this action and desires to unite with the respondent, BAXTER RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, ("respondent"), in resisting the claims of petitioners.

3. On October 24, 1979, petitioners commenced this action seeking a writ of mandate and/or, in the alternative, prohibition and/or certiorari (hereinafter "writ of mandate"), and a decision declaring A.B. 499, the amendment to section 23672 of the California Business and Professions Code, effective January 1, 1980, unconstitutional.

4. Bohemian has a direct interest in the subject matter of this action, in that it stands to lose enormous revenues by direct legal operation of any adverse decision rendered herein. If a decision is rendered holding that the challenged section is unconstitutional, such a decision, as a practical matter, would directly jeopardize Bohemian's financial interests. Furthermore, Bohemian has a substantial financial stake in the marketing system which is preserved by A.B. 499. Disposition of this action in the absence of Bohemian as a party would impair the ability of Bohemian to protect its interests.

5. Bohemian has a common interest with respondent in the success of this action. Bohemian is informed and believes, and upon such information and belief alleges, that respondent may not vigorously pursue his own success in this action and may not, in the event this Court renders a decision adverse to respondent, seek a hearing before the California Supreme Court.

6. Bohemian, through its attorneys, has informed the attorneys for respondent that it will apply for leave of court to intervene in this action, and Bohemian has not heard any objection from respondent regarding its proposed application for leave to intervene.

7. Bohemian, through its attorneys, has informed the attorneys for the other known proposed intervenor that it will apply for leave of court to intervene in this action, and Bohemian has not heard any objection from the attorneys

for the proposed intervenor regarding Bohemian's application for leave to intervene in this action.

WHEREFORE, Bohemian prays judgment against petitioners as follows:

1. That Bohemian be permitted to intervene in this action in order to oppose petitioners' request for a writ of mandate;

2. For costs of this proceeding;

3. For such other and further relief as this court may deem just and proper.

DATED: November 29, 1979

Wyman, Bautzer, Rothman & Kuchel
Frank Rothman
Christina A. Snyder
Rochel S. Blachman
and
George Miron, Of Counsel

By /s/ Frank Rothman
Frank Rothman

Attorneys for Proposed Intervenor
BOHEMIAN DISTRIBUTING COMPANY

(Proof of Service and verification omitted in printing)

6. Complaint in Intervention (of Wine & Spirits Wholesalers of California), Filed November 29, 1979 by Order of December 6, 1979, in California Court of Appeal.

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTION COMPANY, INC., a California corporation d/b/a/ GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREEN CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE d/b/a/ SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE d/b/a/ TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR. and SHIRLEY D. KIRBY d/b/a/ HOUSE OF FINE SPIRITS,

Petitioners,

vs. — **No. 3 Civil 19089**

BAXTER RICE, Director, Department of Alcoholic Beverage Control,

Respondent,

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,

Intervenor.

WYMAN, BAUTZER, ROTHMAN & KUCHEL
Frank Rothman
Christina A. Snyder
Rochel S. Blachman
2049 Century Park East, Suite 1400
Los Angeles, California 90067
Telephone: (213) 556-8000
and
WYMAN, BAUTZER, ROTHMAN & KUCHEL
George Miron

600 New Hampshire Avenue N.W., Suite 580
Washington, D.C. 20037
Telephone: (202) 466-2222
Attorneys for Proposed Intervenor
Bohemian Distributing Company

COMPLAINT IN INTERVENTION

Intervenor, WINE & SPIRITS WHOLESALERS OF CALIFORNIA, appearing by leave of court, alleges:

1. Intervenor, WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation, is a trade association duly organized and existing under the laws of this State and is authorized to represent its members in this proceeding. Intervenor's membership consists of a substantial number of the distilled spirits wholesalers and importers throughout the State of California, and its members sell approximately 80% of the distilled spirits sold by wholesalers to retailers in California. Intervenor's members are all similarly situated with respect to the issues presented by this litigation. Intervenor's members are individually too numerous to come before this Court but constitute a class of persons each of whom has the same substantial and direct interests in the decision to be rendered herein. Intervenor therefore seeks intervention as the representative of the class of its membership.

2. On or about October 24, 1979, Petitioners commenced this proceeding against Respondent, BAXTER RICE, as Director of the Department of Alcoholic Beverage Control of the State of California, seeking a writ of mandate and/or prohibition and/or certiorari to restrain Respondent from enforcing § 23672 of the Business and Professions Code from and after its amendment by Assembly Bill 499, effective January 1, 1980. Petitioners assert that Business and Professions Code § 23672, as amended by AB 499, is

invalid on its face under the California Constitution as an unconstitutional delegation to private parties of the power to regulate the importation of liquor and as a denial of due process and equal protection of the laws.

3. Assembly Bill 499 constitutes a technical amendment to § 23672 and reaffirms the requirement that importers of distilled spirits be authorized by the distilled spirits brand owner or his authorized agent in order to lawfully purchase and accept delivery of distilled spirits imported into California.

4. Intervenor intervenes in this action on the grounds that it has a direct interest in the matters in litigation and a substantial interest in the success of Respondent and, as a practical matter, disposition of this matter in the absence of Intervenor will impair and impede its members' ability to protect their interests. The matter in litigation is the validity of the state-imposed system of regulating the importation of alcoholic beverages whereby a licensed importer is prohibited from purchasing or accepting delivery of any brand of distilled spirits unless he is designated as an authorized importer of the brand by the brand owner or his authorized agent.

5. Section 23572 [sic], as amended, affords Intervenor's members a substantial measure of legitimate protection against unfair, predatory and unlawful business practices, and disposition of this litigation unfavorable to Intervenor's members would deprive them of this valuable protection. The direct and proximate effects that an invalidation of § 23672, as amended, would have on Intervenor's members include the following:

(a) Substantial investments in longstanding wholesale distilled spirits businesses would be immediately, permanently and adversely affected.

(b) A substantial, immediate and permanent

reduction in the value of the existing "authorized" distilled spirits wholesale distributorships would occur.

(c) The goodwill built up over the years by promotional activities and advertising at great cost and expense by the "authorized" distilled spirits wholesalers would be seriously damaged if not totally destroyed.

6. Section 23672, as amended, is part of a comprehensive regulatory scheme designed to facilitate the State's supervision and control over the importation of alcoholic beverages into this State and the disposition and taxation of imported alcoholic beverages within this State. Specifically, § 23672, as amended, will significantly enhance the State's ability to:

(a) Effectively monitor the importation and dispostion of distilled spirits.

(b) Assure payment of excise and sales taxes on distilled spirits.

(c) Maintain the three-tier distribution system in California by assuring independence between distiller, wholesaler-importer, and retailer.

(d) Preserve the competitive viability of small retailers.

(e) Promote the orderly disposition of distilled spirits in conformity with law, including the Unfair Practices Act (Business and Professions Code § 17000, et seq.).

(f) Protect the legitimate interests of brand name distillers in the goodwill and integrity of their brand names and trademarks.

(g) Promote temperance.

7. Intervenor has a substantial interest in the success of the Respondent herein. However, Respondent has not adequately represented the interests of Intervenor's members

and others in upholding the validity of the provisions of the Alcoholic Beverage Control Act in the past, and Intervenor is informed and believes, and on the basis thereof alleges, that Respondent will not adequately represent the interests of Intervenor in the instant matter. Intervenor therefore intervenes in order that the issues raised in this proceeding may be fully litigated and that its members' interests may be adequately protected.

8. Petitioners commenced this proceeding for the purpose of barring the enforcement of § 23672, as amended by AB 499, on the grounds that the statute is invalid as being an unconstitutional delegation of legislative power to private parties and a denial of due process and equal protection of the laws.

9. Section 23672, as amended, does not constitute an unconstitutional delegation of legislative power to regulate the importation of distilled spirits into California nor does it deny petitioners due process or equal protection of the laws. Section 23672, as amended, is a valid exercise of the California Legislature's police powers and the power expressly conferred by the Twenty-First Amendment to the United States Constitution to regulate the importation of alcoholic beverages. The classifications created by the Legislature in § 23672, as amended, are reasonable and bear a rational relationship to the State's legitimate purposes.

10. Intervenor is represented herein by competent and experienced counsel who are familiar with the facts and law involved and will adequately represent the interests affected.

WHEREFORE, Intervenor prays for judgment against Petitioner as follows:

1. That Intervenor be permitted to intervene herein on behalf of its members and to answer Petitioner's Petition for Writ of Mandate and/or Prohibition and/or Certiorari.

2. That this Court hold that the provisions of § 23672, as amended by AB 499, are valid and enforceable and free from any constitutional infirmities and that § 23672, as amended, is a valid exercise of the State's power, derived from the Twenty-First Amendment, to regulate the importation of alcoholic beverages into California.

3. That this Court deny Petitioners' Petition for Writ of Mandate and/or Prohibition and/or Certiorari.

4. For costs of this proceeding.

5. For such other and further relief as the Court may deem just and proper.

DATED: November 29, 1979.

Ball, Hunt, Hart, Brown and Baerwitz
By /s/ Joseph A. Ball
JOSEPH A. BALL
William T. Chidlaw
A Professional Corporation
By /s/ William T. Chidlaw
WILLIAM T. CHIDLAW
Attorneys for Intervenor

(Proof of service and verification omitted in printing)

EXHIBIT L

7. Of Exhibits to Petitioners' Reply Memorandum of Points and Authorities in Support of Petition and Request for Stay of Enforcement, Filed December 21, 1979, in California Court of Appeal.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT

NORMAN WILLIAMS COMPANY, a California corporation, et al.,

Petitioners,

vs **No. 3-CIV-19089**

BAXTER RICE, Director, Department of Alcoholic Beverage Control,

Respondent,

BOHEMIAN DISTRIBUTING COMPANY, a California corporation,

Intervenor,

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,

Intervenor.

FELDMAN, WALDMAN & KLINE
LELAND R. SELNA, JR.
MAX LIEBERMAN
GEORGE G. WEICKHARDT
27th Floor, Russ Building
235 Montgomery Street
San Francisco, CA 94104
Telephone: [415] 981-1300
THOMAS W. MARTIN
926 J Street, Suite 1116
Sacramento, CA 95814
Telephone: [916] 422-1886
Attorneys for Petitioners

EXHIBIT L — LEGISLATIVE HISTORY

Assembly Committee on Governmental Organization
Frank Vicencia, Chairman.

Staff Analysis of Assembly Bill 499 (Vicencia)

As Introduced: February 8, 1979

Subject: Alcoholic Beverages

Consultant: Terry.

SUMMARY

Continues provisions prohibiting an alcoholic beverage wholesaler from importing any brand unless authorized by the brand owner or his authorized agent.

BACKGROUND

The ABC Act presently requires the licensee who files the minimum retail price (fair trade) schedule for a particular brand of distilled spirits to designate those wholesalers authorized to import the brand. The person filing the fair trade price is the brand owner or an authorized agent.

Last May the State Supreme Court declared the fair trade provisions of the ABC Act unconstitutional. Consequently, the restrictions on the unauthorized importation of distilled spirits are invalid.

DESCRIPTION OF THE BILL

This measure deletes the reference to the licensee filing the minimum retail price schedule and instead specifies that it is the brand owner or his authorized agent who must designate the wholesalers authorized to import the brand.

COMMENTS/QUESTIONS

Because of the fair-trade decision it is now technically possible for an unauthorized California wholesaler to acquire and distribute the brands of *any* national distiller.

The unauthorized wholesaler acquires these brands from out-of-state suppliers doing business in "price affirmation" states such as Oklahoma and Michigan. These states require a distiller to certify that its wholesale price within the state is the lowest price being quoted by the distiller in any of the other 49 states.

Unauthorized wholesalers can then import national brands into California and thereby circumvent the exclusive distributorship agreements normally made between distillers and wholesalers.

Presumably, an unauthorized wholesaler can supply retailers with national brands for a lower cost than an authorized wholesaler. However, since there have not yet been any price postings by unauthorized wholesalers, the extent of the savings to retailers is not known.

KNOWN POSITIONS

The following SUPPORT AB 499:

Distilled Spirits Council of the United States
California Wine and Spirits Wholesalers
California Teamsters
California Retail Liquor Dealers Association

The following OPPOSE AB 499:

California Retailers Association
California Grocers Association
Norman-Williams, Inc. (Independent Wholesalers)
Farmers Markets
Consumers Union

WAYS AND MEANS STAFF ANALYSIS

Bill Number—AB 499; Author—Vicencia; Amended —; Item—28; Index—Licensing; Policy Committee—Gov. Organization; Consultant—K. Archuleta.

SUBJECT: Alcoholic Beverages.

FISCAL SUMMARY:	FUND (G,S,N,B, F, or L)	1978/79 FY	1979/80 FY	1980/81 FY
State Cost: None	G	____	____	____
Local Cost: Possible cost to local government for enforcement of law. Bill contains a cost/savings disclaimer.	L	____	____	____

Disclaimed: ☒; Reimbursed: ☐

Urgency: Yes ☐ No ☒

SUMMARY:

AB 499 amends current law to prohibit an alcoholic beverage wholesaler from importing any brand unless authorized by the brand owner or an authorized agent.

COMMENTS:

This bill should contain a Crimes and Infractions disclaimer as to local costs.

FISCAL IMPACT:

AB 499 contains no State costs. There are potential costs to local government for enforcing this law. The bill disclaims the cost and makes no appropriation or reimbursement.

ANALYSIS:

Current law requires the licensee who files the minimum retail price schedule for a particular brand of distilled spirits to designate those wholesalers authorized to import the brand. The person filing the minimum retail price schedule is the brand owner or an authorized agent.

The State Supreme Court last year declared the minimum retail price (fair trade) provisions of the Alcoholic Beverage Control Act unconstitutional. Consequently, the restrictions on the unauthorized importation of alcoholic beverages are invalid.

AB 499 would delete the reference to the licensee filing the minimum retail price schedule and, instead, specify that it is the brand owner or his authorized agent who must designate the wholesalers authorized to import the brand.

ASSEMBLY THIRD READING

AB 499 (Vicencia) As Amended: May 10, 1979.

ASSEMBLY ACTIONS:

Committee--G. O.	Committee—W. & M.
Vote—6-0	Vote—17-2
Ayes:	Ayes: Berman, Chacon, Egeland, Goggin, Hayden, Imbrecht, Knox, Levine, Mori, Roos, Ryan, Statham, Stirling, Vasconcellos, N. Waters, Young, Boatwright
Nays:	Nays: Hart, Duffy

DIGEST

Under the Alcoholic Beverages Control (ABC) Act a licensee (alcohol brand owner or authorized agent) who files the minimum retail (fair trade) price schedule is required to designate the wholesalers authorized to import the brand.

The State Supreme Court, however, has declared the fair trade provisions of the ABC Act unconstitutional.

This bill deletes the reference to the filing of the minimum retail price schedule and instead specifies that the brand owner or the authorized agent must designate wholesalers authorized to import the brand.

FISCAL EFFECT

No state costs.

There are potential enforcement costs to local government. The bill contains a "crimes and infractions" dis-

claimer and provides no appropriation. The bill does, however, recognize that a local agency or school district may make claims for reimbursement.

COMMENTS

Because of the court decision, it is possible for a wholesaler, whether authorized or not, to acquire and distribute the brands of any national distributor. The unauthorized wholesaler acquires these brands from out-of-state suppliers doing business in "price affirmation" states. These states require a distiller to certify that its wholesale price within the state is the lowest price being quoted by the distiller in any of the other 49 states. Unauthorized wholesalers can then import national brands into California and thereby circumvent the exclusive distributorship agreements normally made between distillers and wholesalers. Presumably an unauthorized wholesaler can provide national brands at a lower price.

5/17/79 ASSEMBLY OFFICE OF RESEARCH AB 499

Senate Committee on Governmental Organization
Hearing Date: 6/12/79

STAFF ANALYSIS OF ASSEMBLY BILL NO. 499
(Vicencia)
(As Amended 5/10/79)

SUBJECT

Alcoholic Beverages: Licensed Importers

DESCRIPTION

1. AB 499 specifies that a licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer by the brand owner or his agent.
2. The measure requires that distilled spirits imported into California shall come to rest at the warehouse of the licensed importer before sale and delivery to a retail licensee.
3. The measure contains an SB 90 disclaimer.

BACKGROUND

Related Legislation:

SB 570 (B. Greene), 1979 Session.
Would prohibit any brand owner or manufacturer of distilled spirits from selling product in California at a higher price than it would be sold for anywhere else in the United States. (Approved by this Committee 5/1/79; Approved by Senate 5/25/79; Pending in Assembly policy committee).

For many years California law required the brand owner who filed the minimum retail price schedule for a particular brand of distilled spirits to designate those wholesalers or importers who would be authorized to sell the product in this state.

However, the California Supreme Court decision in 1978 that struck down the so-called "fair trade" law on alcoholic beverages, also invalidated the provision relating to the designation of authorized importers.

As a consequence, it is now possible for any California wholesaler to import and distribute the brands of any distiller or brand owner. This has circumvented the long-standing distributorship agreements between manufacturers and wholesalers.

Supporters stress that AB 499 simply provides that the brand owner can designate any and all wholesalers he desires to handle his product. There is no restriction as to how many wholesalers can be listed. In addition, the measure in no way infringes upon the California Supreme Court decision striking down "fair trade" laws in retail liquor pricing.

Opponents argue that AB 499 will reinstate "fair trade" at the wholesale level, thereby raising retail prices. In addition, the measure will restrict competition unfairly among wholesalers, and prohibit the free importation of liquor from other states.

OWN POSITIONS:

The following organizations *SUPPORT* AB 499:

Wine and Spirits Wholesalers of California
California Retail Liquor Dealers Association
California Teamsters Public Affairs Council

The following organizations *OPPOSE* AB 499:

California Grocers Association
California Retailers Association
Consumers Union
Farmers Markets

WRITTEN COMMUNICATIONS RECEIVED:

California Grocers Association

FISCAL COMMITTEE: Senate Finance Committee

Legislative Analyst
June 19, 1980

ANALYSIS OF ASSEMBLY BILL NO. 499 (Vicencia)
As Amended in Assembly May 10, 1979
1979-80 Session

Fiscal Effect:

Cost: 1. No state cost.
2. *Mandated local cost*, undetermined, if any. No state funding.

Revenue: Undetermined impact on state and local sales tax revenues.

Analysis:

This bill prohibits a licensed alcoholic beverage importer (generally a wholesaler) from purchasing or accepting delivery of any brand of distilled spirits unless he is designated as an authorized importer of the brand by the brand owner or his agent.

Prior to a May 1978, California Supreme Court decision which held that the distilled spirits minimum retail price maintenance law was invalid, a licensed importer could purchase or accept delivery only if he was authorized to do so by the person who filed the minimum retail price schedule. Because the court decision invalidated the schedule requirement, it also invalidated the designation requirement addressed by this bill.

The Department of Alcoholic Beverage Control advises that this bill has no direct state cost. To the extent that this bill increases the prices of distilled spirits it would result in increased state and local sales tax revenues. However, this increase may be offset by changes in consumption patterns which also affects sales tax revenues.

Mandated Local Program. This bill establishes a new misdemeanor which could be enforced by local government at an undetermined, if any, increase in costs. The bill disclaims state responsibility for such costs.

Dated Typed: 6-22-79

POSITIONS

SUPPORT: Wine & Spirits Wholesales [sic] of California, Calif. Retail Liquor Dealers Assn., Calif. Teamsters Public Affairs Council

OPPOSED: Calif. Grocers Assn., Calif. Retailers Assn., Consumers Union, Farmers Market

Committee Votes: Senate Floor Vote:

Assembly Floor Vote: 49-15, pg. 5087 (5-21-79)

DIGEST

AB 499 specifies that a licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer by the brand owner or his agent.

The measure requires that distilled spirits imported into California shall come to rest at the warehouse of the licensed importer before sale and delivery to a retail licensee.

FISCAL EFFECT:

Appropriation: No Fiscal Committee: No Local: Yes

STATE MANDATED LOCAL PROGRAM: SB 90 DISCLAIMER

There are potential enforcement costs to local government. The bill contains a "crimes and infractions" disclaimer and provides no appropriation. The bill does, however, recognize that a local agency or school district may make claims for reimbursement.

COMMENTS:

Related Legislation

SB 570 (B. Greene), 1979 Session.

Would prohibit any brand owner or manufacturer of distilled spirits from selling product in California at a higher price than it would be sold for anywhere else in the United States. (Presently in Assembly)

For many years California law required the brand owner who filed the minimum retail price schedule for a particular brand of distilled spirits to designate those wholesalers or importers who would be authorized to sell the product in this state.

However, the California Supreme Court decision in 1978 that struck down the so-called "fair trade" law on alcoholic beverages, also invalidated the provision relating to the designation of authorized importers.

As a consequence, it is now possible for any California wholesaler to import and distribute the brands of any distiller or brand owner. This has circumvented the long-standing distributorship agreements between manufacturers and wholesalers.

Supporters stress that AB 499 simply provides that the brand owner can designate any and all wholesalers he desires to handle his product. There is no restriction as to how many wholesalers can be listed. In addition, the measure in no way infringes upon the California Supreme Court decision striking down "fair trade" laws in retail liquor pricing.

Opponents argue that AB 499 will reinstate "fair trade" at the wholesale level, thereby raising retail prices. In ad-

dition, the measure will restrict competition unfairly among wholesalers, and prohibit the free importation of liquor from other states.

Assembly Noes: Bergeson, Dennis Brown, Chappie, Duffy, Felando, Hart, Hayden, Hayes, Kelley, Leonard, Mountjoy, Naylor, Statham, Vasconcellos, Wyman

SENATE DEMOCRATIC CAUCUS
SENATOR OMER L. RAINS, *Chairman*

Bill No. AB 499 (As Amended: 5-10-79)

Author: Vicencia (D)

Subject: Alcoholic Beverages.

Finance Committee:

Be placed on Second Reading File pursuant to Senate Rule 28.8.

Policy Committee: Governmental Organization

Ayes (7) Alquist, Beverly, Carpenter, Cusanovich, Foran, Marks, Dills

Noes (0).

Assembly Floor Vote: 49 AYES; 15 NOES.

Summary of Legislation:

Existing law prohibits a licensed importer of distilled spirits from purchasing or accepting delivery of any brand of distilled spirits, unless he is designated as an authorized importer of such brand by the alcoholic beverage licensee who files a minimum retail price schedule for such brand, as specified.

This bill revises such prohibition to require that such licensed importer be designated as an authorized importer of such brand of distilled spirits by the brand owner or his authorized agent prior to such purchase or delivery.

Fiscal Effect:

Contains SB 90 disclaimer language.

Proponents:

Wine and Spirits Wholesalers of California
California Retail Liquor Dealers Association
California Teamsters Public Affairs Council

Opponents:

California Grocers Association
California Retailers Association
Consumers Union
Farmers Markets.

Arguments in Support:

Proponents argue that this bill is the needed protection wholesalers, small retailers, and unions need in order to survive. Small retailers are the bulk of dealers in California, numbering 70%. The unions would suffer severe job losses without this bill. Proponents state that the bulk of consumers in California would benefit from this bill.

Arguments in Opposition:

Opponents argue that this bill reinstates "fair trade" at the wholesale level, thereby raising retail prices. In addition, the measure restricts competition unfairly among wholesalers, and prohibits the free importation of liquor from other states.

ENROLLED BILL MEMORANDUM TO GOVERNOR

Bill No. AB 499; Date July 20, 1979; Author Vicencia.

Vote—Senate _____ Unanimous

Ayes— 21

Noes— 8 Craven, Garamendi, M. Garcia, Mills, Richardson, Vuich, Wilson, Speraw.

Vote—Assembly _____ Unanimous

Ayes— 49

Noes— 15 Bergeson, D. Brown, Chappie, Duffy, Felando, Hart, Hayden, Hayes, Kelley, Leonard, Mountjoy, Naylor, Statham, Vasconcellos, Wyman.

AB 499 — Vicencia Existing statutory law prohibits a licensed importer of distilled spirits from purchasing or accepting delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the alcoholic beverage licensee who files a minimum retail price schedule for such brand, as specified.

This bill would revise such prohibition to require that such licensed importer by [sic] designated as an authorized importer of such brand of distilled spir [sic] by the brand owner of [sic] his authorized agent prior to such purchase or delivery.

SPONSOR

Distilled Spirits Council of the United States.

SUPPORT

California Teamsters Public Affairs Council
Wine & Spirit [sic] Wholesalers of California
Southern California Retail Liquor Dealers Association
California Retailer Liquor Dealers Association
2000 telegrams, mailgrams and letters.

OPPOSITION

Senator Marz Garcia
Senator Craven
California Retailers Association
Consumers Union
California Retail Liquor Dealers Association (San Diego & Imperial Counties)
135 cards and letters.

STATE FISCAL IMPACT

None.

DEPARTMENT OF FINANCE

AUTHOR—Vicencia; Bill Number—AB 499; Date Last Amended—May 10, 1979.

SUBJECT:

This bill would require that any importer of Alcoholic Beverages be licensed by the brand owner or his agent.

SUMMARY OF REASONS FOR VETO

Increased cost of product to the consumer.

FISCAL SUMMARY

1978-79	1979-80	1980-81	Fund
-0-	-0-	-0-	—

ANALYSIS

A. Specific Findings

Current law prohibits a licensed importer of distilled spirits from purchasing or accepting delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the alcoholic beverage licensee who files a minimum retail price schedule for such brand, as specified. A recent California Supreme Court case (*Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 431) declared that provisions requiring the filing of such minimum retail prices to be invalid.

This bill would revise such prohibition to require such licensed importer to be designated as an authorized importer of distilled spirits by the brand owner or his authorized agent prior to such purchase or delivery. In effect, this bill would restore a segment of the "Fair Trade" law and preclude retailers from shopping around to get the best price.

B. Fiscal Summary

None.

8. Order of the California Court of Appeal That the Alternative Writ of Mandate and a Stay Issue, Filed December 31, 1979.

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

Norman Williams Company v. Baxter Rice.

3 Civil 19089.

Filed December 31, 1979.

By the Court:

Let an alternative writ of mandate issue. Respondent's and intervenors' written returns are to be served and filed on or before January 21, 1980. Petitioners' replication, if any, is to be served and filed within 15 days after the filing of the returns.

It is further ordered that respondent Baxter Rice, Director, Department of Alcoholic Beverage Control, is to desist and refrain from taking any action or proceeding to enforce Business and Professions Code Section 23672, as amended by Assembly Bill 499, effective January 1, 1980, pending filing of the returns and further order of this court.

Dated: December 31, 1979.

PUGLIA, P. J.

cc: Leland Selna, Jr.
Max Lieberman
George Weickhardt
Law Office of Feldman, Waldman
and Kline
Russ Bldg., 27th Floor
235 Montgomery St.
San Francisco, CA. 94104

cc: Thomas W. Martin
Attorney at Law
926 J St., #1116
Sacramento, CA. 95814

cc: George Roth
Deputy Attorney General
(Certified)

cc: William T. Chidlaw
Attorney at Law
Point West Executive Center
1455 Response Rd., Suite 191
Sacramento, CA. 95815

cc: Law Office of Ball, Hunt, Hart,
Brown & Baerwitz
Joseph A. Ball
Anthony Murray
Michael Maloney
James Polish
445 S. Figueroa St.
Los Angeles, CA. 90071

cc: Law Office of Wyman, Bautzer,
Rothman & Kuchel (Both Offices)

9. Alternative Writ of Mandate and Stay, Issued by Wilfried J. Kramer, Clerk, California Court of Appeal, Filed December 31, 1979.

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

NORMAN WILLIAMS COMPANY, et al.,
Petitioners,

v. **3 Civil 19089**

BAXTER RICE, Director, Department of Alcoholic Beverage Control,
Respondent,

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California Corporation, and BOHEMIAN DISTRIBUTING COMPANY,
Intervenors.

ALTERNATIVE WRIT OF MANDATE AND STAY

TO BAXTER RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent, and WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California Corporation and BOHEMIAN DISTRIBUTING COMPANY, Intervenors:

WHEREAS, Norman Williams Company, a California Corporation, et al., petitioners herein, have filed their duly verified petition for writ of mandate, and it appearing to this Court that petitioners herein have no other plain, speedy, or adequate remedy at law and that the relief prayed for herein should be granted;

NOW THEREFORE, you the above named Respondent, are hereby commanded forthwith to desist and refrain from taking any action or proceeding to enforce Business and Professions Code Section 23672, as amended by Assembly

Bill 499 effective January 1, 1980, and to indicate to this Court that you have done so or that you show cause in writing on or before January 21, 1980, why you have not done so and why the relief prayed for in this proceeding should not be granted. Pending filing of the return and further order of this Court, you are ordered to desist and refrain from taking any action or proceeding to enforce Business and Professions Code Section 23672 as amended by Assembly Bill 499 effective January 1, 1980. You the above named Respondent and Intervenors are directed to file your written returns by January 21, 1980. Petitioners' replication, if any, is to be filed within 15 days after the filing of the returns.

WITNESS THE HONORABLE ROBERT K. PUGLIA, Presiding Justice of the Court of Appeal of the State of California, in and for the Third Appellate District.

ATTEST my hand and the seal of the Court this 31st day of December, 1979.

WILFRIED J. KRAMER, Clerk,
By /s/ Susan Whiteacre
Deputy

10. Demurrer of Intervenor Bohemian Distributing Company to Amended Petition for Writ of Mandate and/or, in the Alternative, Prohibition and/or Certiorari and Memorandum of Points and Authorities in Support Thereof, Filed January 21, 1980, in California Court of Appeal.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation dba GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE dba SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE dba TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR. and SHIRLEY D. KIRBY dba HOUSE OF FINE SPIRITS,

Petitioners,

vs. **No. 3 Civ 19089**

BAXTER RICE, Director, Department of Alcoholic Beverage Control,

Respondent,

BOHEMIAN DISTRIBUTING COMPANY, a California corporation,

Intervenor.

(Filed concurrently with Answer)

WYMAN, BAUTZER, ROTHMAN & KUCHEL
Frank Rothman
Christina A. Snyder
Two Century Plaza, Fourteenth Floor
2049 Century Park East
Los Angeles, California 90067
Telephone: (213) 556-8000
and
WYMAN, BAUTZER, ROTHMAN & KUCHEL
George Miron
600 New Hampshire Avenue N.W., Suite 580
Washington, D.C. 20037
Telephone: (202) 466-2222
Attorneys for Intervenor
Bohemian Distributing Company

[Table of Contents Omitted in Printing]

Intervenor Bohemian Distributing Company hereby demurs to the amended petition for writ of mandate and/or, in the alternative, prohibition and/or certiorari herein on each of the following grounds:

1. The claims in the amended petition, and each of them, fail on their face to state facts sufficient to constitute a cause of action for issuance of a writ of mandate, and/or, in the alternative, prohibition and/or certiorari, in that the claims in said amended petition fail as a matter of law to support the conclusion that California Business & Professions Code, Section 23572 [sic], as amended by Assembly Bill 499, is unconstitutional on its face or that it violates or is preempted by the federal antitrust laws.

WHEREFORE, intervenor Bohemian Distributing Company prays as follows:

1. That this demurrer be sustained without leave to amend;

2. That the alternative writ and stay order be discharged;

3. That the amended petition be dismissed;

4. For costs of proceeding herein incurred; and

5. For such other and further relief as the court may deem proper.

DATED: January 21, 1980.

Respectfully submitted,

Wyman, Bautzer, Rothman & Kuchel
Frank Rothman
Christina A. Snyder
and
George Miron
By /s/ Frank Rothman
Attorneys for Intervenor
Bohemian Distributing Company

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT

When the legislature recently enacted Assembly Bill No. 499, 1979 Cal. Stats. ch. 280 (hereinafter "A.B. 499"), California rejoined a growing number of states with primary source legislation. A.B. 499 specifically provides that importers may only import into California those distilled spirits as to which they have received authorization from the brand owners.

Petitioners claim that A.B. 499 is unconstitutional on its face in four ways. Petitioners assert that A.B. 499 would delegate legislative power to private persons in violation of their rights under the California Constitution. Petitioners also assert that all wholesalers have both federal and state-of-California constitutional rights to import liquor into California, and that A.B. 499 will deprive them of those rights without due process of law. Petitioners further assert that A.B. 499 would discriminate against them in violation of the federal and state constitutional guaranties of equal protection of law. Finally, petitioners assert that A.B. 499 is inconsistent with, and preempted by, the federal antitrust laws.

In each and every respect, petitioners fail to set forth facts sufficient to state a cause of action. Petitioners' due process claim is deficient, as a matter of law, because there is no constitutional right to import liquor into any state. The Twenty-first Amendment, second section, of the United States Constitution reserves to the states absolute power to prohibit entirely such importation; and, therefore, California, when restricting the use of importers' licenses, does not deprive petitioners, or any of them, of any rights protected by the due process clauses of either the federal or state constitutions. Likewise, there are no protectible rights

inherent in the decision of a single brand owner in determining whether to authorize a particular importer to import into California a particular brand of distilled spirits manufactured by that brand owner; such a decision is personal in nature and cannot be utilized, as a matter of law, to form a cause of action for denial of due process.

The inherently private nature of the decision of the distilled spirits manufacturer also, as a matter of law, defeats petitioners' claim of any unlawful delegation. While the legislature cannot constitutionally avoid its responsibility as to fundamental issues by delegating that responsibility to others, the legislature may constitutionally enact laws which are effectuated by conduct of others so long as that conduct is not legislative in nature. It is beyond dispute that the decision of a particular brand owner in determining whether to authorize a particular importer to import into California a particular brand of distilled spirits manufactured by that brand owner is a purely private act. Since no other action is authorized by A.B. 499, the private actions which trigger the workings of A.B. 499 are merely acts contemplated by the legislature, are purely private in nature and are not in any fashion legislative in character. Therefore, A.B. 499 does not, as a matter of law, delegate the power to make a law and is not unconstitutional as an unlawful delegation.

Petitioners' equal protection claims are also defective. It is without question that in analyzing this claim, A.B. 499 is to be judged under the rational basis standard since A.B. 499 does not draw lines involving a suspect classification nor does it touch on fundamental interests. Under the rational basis test, petitioners are required to show that A.B. 499, as a matter of law, does not bear any rational relationship to a conceivable legitimate state purpose. Not only have petitioners failed to carry their burden, but it has been

affirmatively shown that A.B. 499, does bear a rational relationship to a legitimate state purpose. Under the power of the Twenty-first Amendment, California has enacted a system of laws that regulate the handling and control of alcoholic beverages in every facet of distribution, including extensive record keeping requirements apparently intended to maintain supervision over this highly regulated industry.

This pervasive scheme of economic regulation was supplemented by the adoption of A.B. 499. As a result, California's alcoholic beverage regulators will now possess a direct source of information to determine each brand which each wholesaler is importing, providing a quick and easily accessable [sic] cross-check of sales records in any inquiry into corrupt business practices or tax evasion. Additionally, A.B. 499 allows brand owners to implement effectively vertical restraints to control the efficient distribution of their own products, a power residing in manufacturer of almost all products. More efficient distribution unquestionably can lead to greater interbrand competition and provides greater stability in the chain of distribution. Thus, undeniably, A.B. 499 and the distinctions made therein rationally relate to the legitimate state purpose of control and supervision of an orderly distribution network for alcoholic beverages, and therefore, are not subject to attack under the equal protection guarantees of the federal or state constitutions.

Petitioner's antitrust allegations are also fatally deficient. Nothing contained in A.B. 499 authorizes conspiratorial conduct of any kind nor does it require activity which is in and of itself illegal. The vertical restraints that a brand owner may impose upon the distribution chain of its own product by virtue of A.B. 499 is not conduct which is per se illegal under the antitrust laws; and therefore, a facial attack of A.B. 499 is precluded. Neither does A.B. 499 enter into a field preempted by any federal antitrust law. The distorted

constructions given by petitioners to the Clayton Act, the Federal Trade Commission Act, and the Federal Alcohol Administration Act are completely unsupportable because the interpretations urged by petitioners are not consistent with the plain meaning of these acts, are inconsistent with intent of Congress and ignore the single-trader rule which arises from the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. Accordingly, petitioners have not shown, nor can they show, that A.B. 499 on its face violates or is preempted by the federal antitrust laws.

As a matter of law, petitioners have utterly failed in all respects to show that A.B. 499 is unconstitutional on its face. Petitioners have attempted to distort private acts, into acts of a governmental nature. The nature of the acts involved on the part of the brand owner, *i.e.*, the individual decision of a brand owner in determining whether to authorize a particular importer to import a particular brand of distilled spirits manufactured by that brand owner, is not legislative in nature and cannot support a claim of unlawful delegation; nor is it a propriety [sic] right protected by due process. Furthermore, this activity cannot support a finding of per se illegality with regard to the antitrust laws and cannot support a facial attack on A.B. 499. A.B. 499 was enacted specifically to maintain order in the chain of distribution of liquor and with an eye toward enhanced supervision of this industry. In view of the Twenty-first Amendment, the power of the state to so act cannot be doubted.

II. ARGUMENT

In order to avoid repetition, intervenor Bohemian Distributing Company refers to, and incorporates herein by reference, intervenor Bohemian Distributing Company's

memorandum in opposition to petition for writ of mandate and/or, in the alternative, prohibition and/or certiorari, filed herein on or about November 29, 1979, intervenor Bohemian Distributing Company's memorandum in opposition to amended petition for writ of mandate and/or in the alternative, prohibition and/or certiorari, filed herein on or about December 24, 1979, and intervenor Bohemian Distributing Company's memorandum filed concurrently with return of alternative writ of mandate in opposition to amended petition for writ of mandate and/or, in the alternative, prohibition and/or certiorari, filed concurrently herewith.

III. CONCLUSION

For all of the foregoing reasons, intervenor Bohemian Distributing Company respectfully urges that its demurrer be sustained.

Respectfully submitted,

Wyman, Bautzer, Rothman & Kuchel
Frank Rothman
Christina A. Snyder
and
George Miron — Of Counsel
By /s/ Frank Rothman
Attorneys for Intervenor
Bohemian Distributing Company

(Declaration of Service by Mail Omitted in Printing)

11. Answer of Intervenor Bohemian Distributing Company to Amended Petition for Writ of Mandate and/or, in the Alternative, Prohibition and/or Certiorari, Filed January 21, 1980, in California Court of Appeal. (Filed Concurrently With Demurrer).

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation d/b/a GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE d/b/a SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE d/b/a TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR. and SHIRLEY D. KIRBY d/b/a HOUSE OF FINE SPIRITS,

Petitioners,

vs. **No. 3 Civ. 19089**

BAXTER RICE, Director, Department of Alcoholic Beverage Control,

Respondent,

BOHEMIAN DISTRIBUTING COMPANY, a California corporation,

Intervenor.

(Filed concurrently with Demurrer)

WYMAN, BAUTZER, ROTHMAN & KUCHEL
Frank Rothman
Christina A. Snyder
Two Century Plaza, Fourteenth Floor
2049 Century Park East
Los Angeles, California 90067
Telephone: (213) 556-8000

and
WYMAN, BAUTZER, ROTHMAN &
KUCHEL
George Miron
600 New Hampshire Avenue N.W., Suite 580
Washington, D.C. 20037
Telephone: (202) 466-2222
Attorneys for Intervenor
Bohemian Distributing Company

Intervenor BOHEMIAN DISTRIBUTING COMPANY ("Bohemian") (concurrently with its demurrer thereto) hereby answers the amended petition for writ of mandate and/or, in the alternative, prohibition and/or certiorari as follows:

INTRODUCTORY ANSWER

1. With respect to the first paragraph at page 2 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations, and specifically denies that A.B. 499 is unconstitutional.

2. Answering the second paragraph at page 2 of the amended petition, Bohemian admits that A.B. 499 amends Business and Professions Code §23672 and that A.B. 499 speaks for itself. Bohemian further admits that A.B. 499 was to become effective on January 1, 1980. Except as expressly admitted, Bohemian denies generally and specifically each and all said allegations.

3. Answering the first and second sentences of the first paragraph at page 3 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the third, fourth and fifth sentences of the first paragraph at page 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allega-

tions contained therein, and on that ground, denies generally and specifically each and all said allegation.

4. Answering the first, second and third sentences of the second paragraph at page 3 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the fourth sentence of the second paragraph at page 3 of the amended petition, Bohemian admits that some distillers have already refused to grant some wholesalers, including some petitioners, permission to import their brands; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the fifth and sixth sentences of the second paragraph at pages 3 and 4 of the amended petition, Bohemian denies generally and specifically each and all said allegation.

5. Answering the first full paragraph at page 4 of the amended petition, Bohemian denies generally and specifically each and all said allegations.

ANSWER RE CLAIMED BENEFICIAL INTEREST OF PETITIONERS

6. Answering the first paragraph of paragraph 1 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations.

Answering the first sentence of the second paragraph of paragraph 1 of the amended petition, Bohemian admits that certain wholesaler petitioners have already sought and been refused authorization from distillers to act as importers of their brands under A.B. 499; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies

generally and specifically each and all said allegations. Answering the second sentence of the second paragraph of paragraph 1 of the amended petition, Bohemian admits that were A.B. 499 enforced, wholesalers who have not been designated by any brand owner could not import into California branded distilled spirits; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the third sentence of the second paragraph of paragraph 1 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations.

ANSWER RE CLAIMED CAPACITY OF RESPONDENT

7. Answering the first sentence of paragraph 2 of the amended petition, Bohemian admits that respondent BAXTER RICE is the duly appointed director of the Department of Alcoholic Beverage Control and is charged by law with administering and enforcing, among other things, the provisions of the Alcoholic Beverage Control Act; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the second sentence of paragraph 2 of the amended petition, Bohemian admits that, commencing on January 1, 1980, respondent BAXTER RICE was, but for the issuance of the alternative writ of mandate herein, required to enforce Business & Professions Code § 23672, as amended by A.B. 499; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations.

ANSWER RE CLAIMED STATEMENT OF FACTS

8. Answering the first sentence of the first paragraph of paragraph 3 of the amended petition, Bohemian admits that a substantial portion of distilled spirits consumed in

California are produced outside of California, and are imported into the state; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the second sentence of the first paragraph of paragraph 3 of the amended petition, Bohemian denies generally and specifically each and all said allegations.

Answering the first and second sentences of the second paragraph of paragraph 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the third sentence of the second paragraph of paragraph 3 of the amended petition, Bohemian admits that there is included in the moving papers Exhibits A-1 through A-5, all of which exhibits speak for themselves; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the fourth sentence of the second paragraph of paragraph 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the fifth sentence of the second paragraph of paragraph 3 of the amended petition, Bohemian admits that Seagram, National Distillers, Heublein, Hiram Walker, Schenley, Brown-Foreman, Bacardi, Fleishmann, Somerset, Gordon/Renfield, Jim Beam, Glenmore, Liggett, Buckingham, and Foremost-McKesson, plus several others, market nationally advertised brands of distilled spirits; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the sixth, seventh and eighth sentences of the second paragraph of paragraph 3 of the amended petition,

Bohemian admits that Exhibits A and B are included in petitioners' moving papers and that such exhibits speak for themselves; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations.

Answering the first sentence of the third paragraph of paragraph 3 of the amended petition, Bohemian admits that on or about May 30, 1978, the California Supreme Court issued an opinion in *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal.3d 431, 146 Cal.Rptr. 585 (1978), which opinion speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the second sentence of the third paragraph of paragraph 3 of the amended petition, Bohemian admits that former Business & Professions Code § 23672 speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the third sentence of the third paragraph of paragraph 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations.

Answering the first sentence of the fourth paragraph of paragraph 3 of the amended petition, Bohemian admits and alleges that after the *Rice* decision, the Department of Alcoholic Beverage Control did not enforce §23672 of the Business and Professions Code; except as expressly admitted and/or alleged, Bohemian denies generally and specifically each and all said allegations. Answering the second sentence of the fourth paragraph of paragraph 3 of the amended petition, Bohemian admits that after the *Rice* decision, some wholesalers began purchasing nationally advertised brands of distilled spirits from jobbers in the State

of Oklahoma where there is an affirmation law; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically and each and all said allegations. Answering the third sentence of the fourth paragraph of paragraph 3 of the amended petition, Bohemian admits that wholesalers, including some petitioners, who have not been designated by brand owners pursuant to A.B. 499, have been importing spirits into California and reselling to retailers; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the fourth sentence of the fourth paragraph of paragraph 3 of the amended petition, Bohemian admits that Exhibits D, E and G speak for themselves; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the fifth and sixth sentences of the fourth paragraph of paragraph 3 of the amended petition, Bohemian admits that the *Rice* court observed California retail liquor prices to be at that time the highest in the nation; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the seventh sentence of the fourth paragraph of paragraph 3 of the amended petition, Bohemian admits that Exhibit B speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the eighth sentence of the fourth paragraph of paragraph 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations.

Answering the first sentence of the fifth paragraph of paragraph 3 of the amended petition, Bohemian admits that generally in California wholesale distributors, such as itself, who have been designated by brand owners pursuant to A.B. 499 are supplied directly by the distillers, *i.e.*, brand owners, but that wholesale distributors who have not been designated by brand owners are not supplied directly by distillers, *i.e.*, brand owners; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the second sentence of the fifth paragraph of paragraph 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the third sentence of the fifth paragraph of paragraph 3 of the amended petition, Bohemian admits that Exhibit B speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the fourth and fifth sentences of the fifth paragraph of paragraph 3 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the sixth sentence of the fifth paragraph of paragraph 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the seventh sentence of the fifth paragraph of paragraph 3 of the amended petition, Bohemian denies generally and specifically each and all said allegations.

Answering the first sentence of the sixth paragraph of paragraph 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations con-

tained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the second sentence of the sixth paragraph of paragraph 3 of the amended petition, Bohemian admits that Exhibit C speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the third and fourth sentences of the sixth paragraph of paragraph 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the fifth sentence of the sixth paragraph of paragraph 3 of the amended petition, Bohemian admits that Exhibit D speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the sixth and seventh sentences of the sixth paragraph of paragraph 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the eighth sentence of the sixth paragraph of paragraph 3 of the amended petition, Bohemian admits that Exhibit E speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations.

Answering the first sentence of the seventh paragraph of paragraph 3 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the second, third and fourth sentences of the seventh paragraph of paragraph 3 of the amended petition Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the fifth and sixth sentences of the seventh paragraph of

paragraph 3 of the amended petition, Bohemian admits that Exhibits D, E and G speak for themselves; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the seventh sentence of the seventh paragraph of paragraph 3 of the amended petition, Bohemian denies generally and specifically each and all said allegations.

Answering the first sentence of the eighth paragraph of paragraph 3 of the amended petition, Bohemian admits that after the passsage of the A.B. 499, some wholesalers, including some petitioners, were denied authorization from the major distillers to import their brands of distilled spirits into California; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the second sentence of the eighth paragraph of paragraph 3 of the amended petition, Bohemian admits that Exhibit F speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the third sentence of the eighth paragraph of paragraph 3 of the amended petition, Bohemian admits that those wholesalers who were refused authorization to import from major distillers cannot pursuant to A.B. 499 import the brands of those brand owners into California; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations.

Answering the first, second and third sentences of the ninth paragraph of paragraph 3 of the amended petition, Bohemian denies generally and specifically each and all said allegations.

ANSWER RE CLAIMED BASIS FOR RELIEF

9. Answering the first sentence of the first paragraph of paragraph 4 of the amended petition, Bohemian admits that absent a restraining order of the Court, respondent would have been required to enforce A.B. 499 as of January 1, 1980; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the second sentence of the first paragraph of paragraph 4 of the amended petition, Bohemian admits that absent a restraining order of the Court, respondent would be required to commence disciplinary proceedings against those petitioners who have not been designated by brand owners, should such petitioners continue to import branded spirits of brand owners who have chosen not to designate them; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations.

Answering the first and second sentences of the second paragraph of paragraph 4 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the third sentence of the second paragraph of paragraph 4 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the fourth, fifth and sixth sentences of the second paragraph of paragraph 4 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the seventh sentence of the second paragraph of paragraph 4 of the amended petition, Bohemian admits that pages 20-28 of petitioners' memorandum of points and authorities ("memo") speak for themselves, except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the eighth, ninth and tenth sentences of the second paragraph of par-

agraph 4 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the eleventh sentence of the second paragraph of paragraph 4 of the amended petition, Bohemian admits that pages 28-34 of the memo speak for themselves; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the twelfth, thirteenth, fourteenth and fifteenth sentences of the second paragraph of paragraph 4 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the sixteenth sentence of the second paragraph of paragraph 4 of the amended petition, Bohemian admits that pages 12-13 of the memo speak for themselves; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the seventeenth sentence of the second paragraph of paragraph 4 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the eighteenth sentence of the second paragraph of paragraph 4 of the amended petition, Bohemian admits that pages 34-42 of the memo speaks for themselves; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations.

Answering the first and second sentences of the third paragraph of paragraph 4 of the amended petition, Bohemian denies generally and specifically each and all said allegations.

ANSWER RE CLAIMED INADEQUACY OF OTHER REMEDIES

10. Answering the first and second sentences of the first paragraph of paragraph 5 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the third sentence of the first paragraph

of paragraph 5 of the amended petition, Bohemian admits that some wholesalers including some petitioners, have sought and have been refused the authorization from major distillers to act as importers of their brands; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the fourth sentence of the first paragraph of paragraph 5 of the amended petition, Bohemian admits that A.B. 499 speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations.

Answering the first, second, third and fourth sentences of the second paragraph of paragraph 5 of the amended petition, Bohemian admits that Constitution Article III, §3.5 speaks for itself; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations.

Answering the first and second sentences of the third paragraph of paragraph 5 of the amended petition, Bohemian admits that *Capiscean Corp. v. Alcoholic Beverage Control Appeals Bd.*, 87 Cal.App.3d 996, 151 Cal.Rptr. 492 (1979), speaks for itself; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations.

Answering the first, second, third, fourth and fifth sentences of the fourth paragraph of paragraph 5 of the amended petition, Bohemian admits that applicable sections of the Business & Professions Code speak for themselves; except as expressly admitted, Bohemian lacks sufficient informa-

tion or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations.

ANSWER RE CLAIMED IRREPARABLE DAMAGE THREATENED

11. Answering the first sentence of paragraph 11 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the second sentence of paragraph 11 of the amended petition, Bohemian denies generally and specifically each and all said allegations.

ANSWER RE CLAIMED REASON FOR ORIGINAL APPLICATION TO HIGHER COURT

12. Answering the introductory sentence, *i.e.*, the first paragraph of paragraph 7 of the amended petition, Bohemian admits that California Rules of Court, Rule 56(a)(1) speaks for itself and hereby incorporates the foregoing answers to paragraphs 1 through 6 of the amended petition as though set forth at length; except as expressly admitted or otherwise incorporated herein, Bohemian denies generally and specifically each and all said allegations.

Answering the first, second, third and fourth sentences of the second paragraph of paragraph 7 of the amended petition, Bohemian denies generally and specifically each and all said allegations.

Answering the first sentence of the third paragraph of paragraph 7 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the second sentence of the third paragraph of paragraph 7 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained

therein, and on that ground, denies generally and specifically each and all said allegations. Answering the third sentence of the third paragraph of paragraph 7 of the amended petition, Bohemian denies generally and specifically each and all said allegations.

Answering the first sentence of the fourth paragraph of paragraph 7 of the amended petition, Bohemian admits that since petitioners' attack is facial, a trial on the facts is unnecessary; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the second and third sentences of the fourth paragraph of paragraph 7 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the fourth sentence of the fourth paragraph of paragraph 7 of the amended petition, Bohemian admits that the *Rice* case speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all of said allegations.

Answering the fifth paragraph of paragraph 7 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations.

FIRST AFFIRMATIVE DEFENSE

13. The amended petition, and each claim therein, does not state facts sufficient to constitute grounds for relief nor any cause of action.

SECOND AFFIRMATIVE DEFENSE

14. A.B. 499 does not improperly delegate to private parties that state's exclusive power to license the importation of alcoholic beverages into the state.

THIRD AFFIRMATIVE DEFENSE

15. A.B. 499 does not constitute an improper delegation.

FOURTH AFFIRMATIVE DEFENSE

16. A.B. 499 does not deprive petitioners of procedural or substantive due process in violation of Article I, §7 of the California Constitution, nor Fifth and Fourteenth Amendments to the United States Constitution.

FIFTH AFFIRMATIVE DEFENSE

17. A.B. 499 is neither preempted by the federal antitrust laws, the Sherman Act, the Clayton Act, the Federal Trade Commission Act, nor the Federal Alcoholic Administration Act (which is not an antitrust law).

SIXTH AFFIRMATIVE DEFENSE

18. A.B. 499 does not deprive petitioners of equal protection of the laws under Article I, §7 of the California Constitution, nor under the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Bohemian prays for judgment as follows:

1. That the alternative writ of mandate and stay order issued herein on December 31, 1979 be discharged.

2. That A.B. 499 be declared effective and immediately operative.

3. That petitioners take no relief by virtue of the amended petition herein.

4. That Bohemian recover its costs and attorneys' fees in this action.

5. That the court grant such other and further relief as it may deem just and proper.

Dated: January 21, 1980

Wyman, Bautzer, Rothman & Kuchel
Frank Rothman
Christina A. Snyder
George Miron, of Counsel
By /s/ Frank Rothman
Frank Rothman
Attorneys for Intervenor
Bohemian Distributing
Company

(Declaration of service by mail and verification omitted in printing).

12. Return of Intervenor Wine & Spirits Wholesalers of California to Alternative Writ by Way of General Demurrer and Answer, Filed January 21, 1980, in California Court of Appeal.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT.

NORMAN WILLIAMS COMPANY, etc., et al.,
Petitioners,

vs. **3 Civil 19089**

BAXTER RICE, Director, Department of Alcoholic Beverage Control,
Respondent.

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation, and BOHEMIAN DISTRIBUTING COMPANY, a California corporation,
Intervenors.

Law Offices of
WILLIAM T. CHIDLAW
A Professional Corporation
Point West Executive Centre
1455 Response Road, Suite 19
Sacramento, California 95815
Telephone: (916) 920-0202

BALL, HUNT, HART, BROWN AND BAERWITZ
JOSEPH A. BALL
ANTHONY MURRAY
MICHAEL J. MALONEY
JAMES POLISH
445 South Figueroa Street
Los Angeles, California 90071

Telephone: (213) 628-0924
Attorneys for Intervenor
Wine & Spirits Wholesalers
of California

DEMURRER

Intervenor Wine & Spirits Wholesalers of California (hereinafter "Wholesalers Association") hereby demurs generally to the Amended Petition, filed herein on November 20, 1979, on the following grounds:

1. The Amended Petition fails to state facts sufficient to state a cause of action against Wholesalers Association; and

2. This Court lacks subject matter jurisdiction to consider the federal antitrust claims raised in the Amended Petition.

DATED: January 21, 1980.

Respectfully submitted,
Ball, Hunt, Hart, Brown and Baerwitz
By /s/ Joseph A. Ball
JOSEPH A. BALL
WILLIAM T. CHIDLAW
A Professional Corporation
By /s/ William T. Chidlaw
WILLIAM T. CHIDLAW
Attorneys for Intervenor
Wine & Spirits Wholesalers of California

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER

Pursuant to Code of Civil Procedure, Section 1089, a party upon whom an alternative writ has been served may make a return by "demurrer, verified answer or both." Appellate Rule 56(c) of the California Rules of Court is to the same effect. Since this case should be decided as a matter of law and because the Amended Petition is defective and objectionable on its face, Wholesalers Association has filed the instant demurrer.

By their Amended Petition, petitioners *facially* challenge the constitutionality of Business and Professions Code, Section 23672, as amended by A.B. 499 (hereinafter "Designation Statute"), on several alleged bases, which are summarized generally as follows:

(1) The Designation Statute is not supported by legitimate governmental purposes and therefore petitioners imply that the Designation Statute violates due process;

(2) The Designation Statute unlawfully delegates to brand owners of distilled spirits state power "to regulate importation of liquor;"

(3) Assuming a delegation of power to brand owners, the Designation Statute violates due process and is improper because it lacks sufficient safeguards against abuse in the exercise of the power;

(4) The Designation Statute deprives petitioners of equal protection of the laws by (a) creating a distinction between designated importers and undesignated importers, and (b) imposing restrictions on importers of distilled spirits without imposing similar restrictions on importers of wine and beer; and

(5) The Designation Statute is inconsistent with and preempted by federal antitrust laws.

Wholesalers Association heretofore has briefed extensively the legal issues in this case in its Opening Memorandum and Supplemental Memorandum; and in support of its return to the alternative writ, Wholesalers Association has filed herewith another memorandum which discusses at length certain legal issues raised in petitioners' Reply Memorandum and Amended Petition. Rather than repeat its legal arguments here, Wholesalers Association incorporates herein by reference the legal points and authorities contained in its above memoranda and summarizes generally its legal contentions advanced by the demurrer as follows:

(1) The Designation Statute was enacted under the authority of the Twenty-First Amendment to the United States Constitution, is supported by legitimate governmental purposes, and does not violate due process;

(2) Leading California Supreme Court cases on delegation of legislative power conclusively establish that the Designation Statute *delegates no power* to brand owners;

(3) Even if petitioners could show a delegation of power to brand owners, safeguards against abuse exist in the purposes for the statute, the applicability of the Sherman Antitrust Act and the regulatory power of the Department of Alcoholic Beverage Control;

(4) The Designation Statute creates rational classifications designed to further legitimate governmental functions consistent with the dictates of the Federal and State Equal Protection Clauses;

(5) This Court lacks subject matter jurisdiction to consider petitioners' federal antitrust challenge to the Designation Statute because exclusive jurisdiction of such claim resides with the federal courts; and

(6) Apart from the jurisdictional issue, petitioners' federal antitrust contention will not withstand analysis because

(a) there is no irreconcilable conflict between the Designation Statute and the federal antitrust laws, (b) the "state action" exemption to the Sherman Act is applicable in this case, and (c) the Designation Statute is a valid exercise of the State's authority under the Twenty-first Amendment to the United States Constitution.

Based on the foregoing, Wholesalers Association respectfully submits that this Court should sustain the demurrer.

DATED: January 21, 1979.

Respectfully submitted,

Ball, Hunt, Hart, Brown and Baerwitz

By /s/ Joseph A. Ball

JOSEPH A. BALL

WILLIAM T. CHIDLAW

A Professional Corporation

By /s/ William T. Chidlaw

WILLIAM T. CHIDLAW

Attorneys for Intervenor

Wine & Spirits Wholesalers of California

ANSWER OF INTERVENOR WINE & SPIRITS WHOLESALERS OF CALIFORNIA TO AMENDED PETITION FOR WRIT.

(Filed Concurrently With Demurrer)

Intervenor Wine & Spirits Wholesalers of California ("Wholesalers Association" herein) answers for itself alone the Amended Petition for Writ of Mandate and/or, in the Alternative, Prohibition and/or Certiorari ("Amended Petition" herein) as follows:

1. Answering the first paragraph on page 2, Wholesalers Association denies that A.B. 499 is unconstitutional.

2. Answering the second paragraph on page 2, Wholesalers Association admits the allegations contained therein.

3. Answering the first paragraph on page 3, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association alleges that:

(a) It has no information or belief sufficient to enable it to answer the allegation that "[a]pproximately 90% of the distilled spirits consumed in California are nationally advertised brands produced by large out-of-state distilling companies" and, basing its denial on that ground, denies said allegation;

(b) There are six major designated importers of nationally-advertised brands in Northern California, six in Southern California and one in Central California, who collectively sell approximately 70 percent of the wholesale volume of distilled spirits in California. Wholesalers Association further alleges that there are in excess of 30 designated importers of nationally-advertised distilled spirits in California and in excess of 100 designated importers of distilled spirits of all kinds in California.

(c) Designated importers of nationally advertised brands are required by California law to post with the Department of Alcoholic Beverage Control the prices at which they sell distilled spirits to retail licensees. (Bus. & Prof. Code § 24756.) Designated importers are legally obligated under California's three-tier system of distribution (Business and Professions Code §§25500, *et seq.*) to *independently* post such prices and, in fact, do independently post such prices.

4. Answering the second paragraph commencing on page 3, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association alleges that:

(a) Business and Professions Code §23672, as amended by A.B. 499 (the "Designation Statute" herein), recognizes the right of brand owners to select the importers who will carry their products;

(b) It has no information or belief sufficient to enable it to answer the allegations that petitioners sell liquor to retailers at prices "significantly below" the prices suggested by distillers in that, among other things, the term "significantly" is imprecise and vague. Basing its denial upon that ground, it denies said allegations. However, Wholesalers Association further alleges that petitioners have recently posted some prices for top-of-the-line brands at prices lower than the prices at which the franchised wholesalers have been selling the same brands to retail licensees in accordance with posted prices.

(c) The letters constituting the correspondence between the wholesaler petitioners and certain brand owners or distillers [which letters are contained in Exhibit F to petitioners' original petition filed herein] appear to be copies of authentic correspondence; and on that basis, Wholesalers Association admits that those distillers who are referred to in said correspondence are

apparently presently satisfied with their presently designated importers and do not desire presently to either take away any existing designation or add any new ones.

(d) The Designation Statute, by supporting a stable intra-brand distribution system, enhances interbrand competition among competing nationally advertised brands of distilled spirits.

(e) Under A.B. 570, which became effective as Business and Professions Code §23673 on January 1, 1980, licensed California wholesalers of distilled spirits will receive the benefit of the lowest prices at which any nationally advertised brand of distilled spirits is offered anyplace else in the United States. Thus, the Designation Statute, if it is permitted to operate in conjunction with Business and Professions Code §23673, will afford California wholesalers the benefit of the lowest prices at which distilled spirits are offered in the country and thus will permit California wholesalers the opportunity of passing through any resultant cost savings to retailers.

5. Answering the first paragraph commencing on page 4, Wholesalers Association denies each and every allegation contained in said paragraph in the conjunctive as well as the disjunctive and specially denies that the statute is unconstitutional on any of the grounds alleged in said paragraph, or on any other ground.

6. Answering the second paragraph commencing on page 4, Wholesalers Association admits the allegations contained therein, except that Wholesalers Association alleges that it has no information or belief sufficient to enable it to answer the allegations that "GREENE CAT, AULDRIDGE, PIERCE and KIRBY each currently have monthly gross sales of distilled spirits of under $17,000 [or any other sum] and obtain supplies from time to time from one or

more of the wholesaler petitioners'' and, basing its denial upon that ground, denies said allegations.

7. Answering the first paragraph commencing on page 5, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association incorporates herein by this reference the allegations of paragraph 3(a) and 4(c) of this answer.

8. Answering the last paragraph commencing on page 5, Wholesalers Association admits the allegations contained therein.

9. Answering the first paragraph commencing on page 6, Wholesalers Association admits the first sentence of said paragraph and denies each and every allegation contained in the second sentence of said paragraph, except that Wholesalers Association alleges that there currently is ''very little intrabrand price'' difference but there is 'intrabrand price competition'' at the wholesale level; Wholesalers Association further alleges that there is substantial interbrand price competition and price difference at the wholesale level.

10. Answering the second paragraph commencing on page 6, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association:

(a) Alleges on information and belief that the distillers identified in said paragraph are 15 of the largest distillers in the United States, but Wholesalers Association has no information or belief sufficient to enable it to answer the allegations contained in said paragraph concerning the current market shares of said distillers and, basing its denial upon that ground, denies said allegations;

(b) Admits that the publications identified in said paragraph are standard industry sources for market data and that Exhibits A-1 through A-5 are extracts there-

from;

(c) Alleges that the 15 companies identified in said paragraph and a substantial number of others market nationally advertised brands of distilled spirits;

(d) Incorporates herein by this reference the allegations of paragraph 3(a) of this answer;

(e) Alleges that it has no information or belief sufficient to enable it to answer the allegations that "[t]he remaining 10% consists of numerous small 'private label' brands which are not nationally advertised" and, basing its denial upon that ground, denies said allegations.

11. Answering the first paragraph commencing on page 7, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association:

(a) Alleges that on May 30, 1978, the Supreme Court in *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal.3d 431, 146 Cal.Rptr. 585 (1978) ("*Rice*" herein), held that Business and Professions Code §24755 was invalid because it was in conflict with the Sherman Act;

(b) Admits the allegations in the second sentence of said paragraph insofar as they state the substance of the language of the statute and alleges that Business and Professions Code §23672 so provided until its amendment by A.B. 499, effective January 1, 1980;

(c) Admits the allegations in the last sentence of said paragraph, but alleges that it has no information or belief as to whether any petitioner ever sought to become an authorized importer prior to the adoption of A.B. 499.

12. Answering the last paragraph commencing on page 7, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association:

(a) Alleges that under Oklahoma law, distillers are required to sell distilled spirits to any and all licensed wholesalers (or jobbers) in Oklahoma and that Oklahoma wholesalers are authorized to sell distilled spirits out-of-state to "qualified persons";

(b) Admits that after the decision in *Rice*, the wholesaler petitioners began purchasing nationally advertised brands of distilled spirits from wholesalers in the State of Oklahoma, imported said spirits into California and resold them to California retailers;

(c) Alleges that it has no information or belief sufficient to enable it to answer the allegation that petitioners have been selling imported spirits to retailers at prices "significantly below" the prices at which franchised wholesalers sell to retailers and, basing its denial upon that ground, denies said allegation;

(d) Alleges that *at least some* of the prices for distilled spirits posted by petitioners have been lower than the prices posted by franchised wholesalers for the same product;

(e) Alleges that it has no information or belief sufficient to enable it to answer the allegation that California retail liquor prices "have now fallen to a level below the national average" and, basing its denial upon that ground, denies said allegation;

(f) Alleges that it has no information or belief sufficient to enable it to answer the allegation that independent wholesalers like petitioners "now handle about ten to fifteen percent of the volume of major distilled spirits distributed in the State," and, basing its denial upon that ground, denies said allegation; Wholesalers Association further alleges that the total volume of sales of distilled spirits from wholesale to retail in California is slightly lower for the nine months from January to September 1979 as compared with January to September 1978. The total volume of sales of dis-

tilled spirits from wholesale to retail in California is higher for the month of August, 1979 than August of 1978. The total volume for July of 1979 is lower than for July of 1978. The total volume for September of 1979 is lower than September of 1978. The total volume for October of 1979 is higher than for October of 1978. The reason for the difference from month to month is the amendment this past year in Rule 100 which changed the posting period from 30 days to 60 days. Many retailers are now making most of their purchases of distilled spirits in the latter 30 days of the 60-day period thus distorting a year-to-year, month-by-month comparison of sales;

(g) Admits that Exhibit B is a true and correct copy of the Monthly Reports of the California State Board of Equalization for distilled spirits excise tax payments for the months June, 1978 through May, 1979;

(h) Admits the last sentence of said paragraph but alleges on information and belief that the wholesaler petitioners infrequently sell distilled spirits imported from Oklahoma jobbers to small family-owned retailers or other small retailers and frequently fail to provide satisfactory service or delivery to small retailers to whom they purport to have offered to sell such distilled spirits.

(i) Alleges on information and belief that much of the distilled spirits purchased by the nondesignated California importers from Oklahoma wholesalers is diverted in transit, and the merchandise never in fact enters Oklahoma.

13. Answering the paragraph commencing on page 8, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association:

(a) Admits the first sentence of said paragraph;

(b) Alleges that some designated importers are

larger and some are smaller than nondesignated importers;

(c) Alleges that designated importers sell approximately 80 percent of the *wholesale* volume of distilled spirits in California;

(d) Alleges that many distillers have between three and six designated importers in the Southern and/or in the Northern marketing areas of California;

(e) Alleges that the importers identified by petitioners in said paragraph are designated importers whose principal places of business are in the geographical areas specified, that they account for approximately 70 percent of wholesale volume in the state and that there are a number of additional designated importers in California;

(f) Alleges that designated importers are unrestricted as to the geographic areas in which they may sell distilled spirits to retail licensees.

14. Answering the paragraph commencing on page 9, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association:

(a) Admits that Exhibits D and E are true and correct copies of excerpts from the periodicals identified in said paragraph and that *Patterson's California Beverage Journal* (hereinafter "*Patterson's*") is a standard industry compilation of price data;

(b) Alleges that *Patterson's* contains wholesale price data which has been obtained from the postings made by licensed wholesalers in the Southern California area pursuant to Business & Professions Code §24756;

(c) Alleges that Exhibit C includes documents containing prices suggested by certain distillers and that from time-to-time such documents are distributed to some wholesalers by some distillers;

(d) Incorporates herein by this reference the alle-

gations of paragraph 3(c) of this answer.

(e) Alleges that the prices reflected in *Patterson's*, relied upon by petitioners, are prices which have been posted pursuant to Business and Professions Code §24756, generally prior to the time wholesalers adjust their posted prices to meet competition, as authorized by Department Rule 100(e) and (f);

(f) Alleges that franchised wholesalers sell at the prices which they post with the Department of Alcoholic Beverage Control and which are specified in *Patterson's* and *Beverage Industry News Merchandiser*, subject to adjustments for purposes of meeting competition as authorized by Department Rule 100(e) and (f).

15. Answering the paragraph commencing on page 10, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association:

(a) Alleges that it has no information or belief sufficient to enable it to answer the allegations that "[t]he cost to the independent wholesalers is several dollars per case above that paid by the franchisees (because of the Oklahoma jobber's markup and additional freight)" and that "[t]he independents must also pay cash" and, basing its denial upon that ground, denies said allegations;

(b) Alleges on information and belief that, as a general practice, designated importers have established credit terms with distillers;

(c) Alleges that at least some of the prices posted by nondesignated importers are lower than prices posted by designated importers for the same product;

(d) Admits that Exhibit G is a true and correct copy of certain price postings by petitioner Norman Williams Company;

(e) Alleges that it has no information or belief sufficient to enable it to answer the allegation that "[p]rice

competition from the independents has produced a reduction in the 'suggested' wholesale prices over the last year in many fast-moving brands'' and, basing its denial upon that ground, denies said allegation.

16. Answering the first paragraph commencing on page 11, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association incorporates herein by this reference the allegations of paragraph 4(c) of this answer.

17. Answering the second paragraph commencing on page 11, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association:

(a) Alleges that the first sentence of said paragraph is speculative and that it has no information or belief sufficient to enable it to answer the allegations of said sentence, and, basing its denial upon that ground, denies said allegations;

(b) Incorporates herein by this reference the allegations contained in paragraphs 3 (c) and 3(d) of this answer.

18. Answering the third paragraph commencing on page 11, Wholesalers Association admits the allegations contained therein, except that Wholesalers Association denies that the Designation Statute is unconstitutional.

19. Answering the paragraph commencing on page 12, Wholesalers Association denies each and every allegation contained therein, in the conjunctive as well as the disjunctive.

20. Answering the paragraph commencing on page 13, Wholesalers Association denies each and every allegation contained therein, in the conjunctive as well as the disjunctive, except that Wholesalers Association incorporates

herein by this reference the allegations contained in paragraph 4(c) of this answer.

21. Answering the first paragraph commencing on page 14, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association:

(a) Incorporates herein by this reference the allegations contained in paragraph 4(c) of this answer;

(b) Admits that the Designation Statute provides no administrative review of private action by distillers and alleges that no such review is required by law.

22. Answering the second paragraph commencing on page 14, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association:

(a) Alleges that under §3.5 of Article 3 of the California Constitution, administrative agencies are not authorized to declare a statute unenforceable or to refuse to enforce it on the ground that it is unconstitutional unless an appellate court has first determined that it is unconstitutional;

(b) Admits the allegations contained in the last two sentences of said paragraph.

23. Answering the first and second paragraphs commencing on page 15, Wholesalers Association admits the allegations contained therein.

24. Answering the third paragraph commencing on page 15, Wholesalers Association denies each and every allegation contained therein and alleges that none of petitioners has any long-term business or business relationship with any out-of-state supplier of major brand distilled spirits.

25. Answering the first paragraph commencing on page 16, Wholesalers Association denies each and every allegation contained therein and specially denies that it is either

proper or necessary for a writ to issue from the California Supreme Court or from any other court.

26. Answering the second paragraph commencing on page 16, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association admits that this proceeding involves the constitutionality of a statute of statewide effect.

27. Answering the first two paragraphs commencing on page 17, Wholesalers Association denies each and every allegation contained therein, in the conjunctive as well as the disjunctive, except that Wholesalers Association alleges that on the basis of the issues as framed by the petitioners, a trial on the facts is unnecessary.

28. Answering the first paragraph commencing on page 18, Wholesalers Association admits the allegations contained therein.

FIRST AFFIRMATIVE DEFENSE

29. The Amended Petition fails to allege facts which constitute or state a cause of action.

SECOND AFFIRMATIVE DEFENSE

30. To the extent the Amended Petition is based on the alleged preemption of the Designation Statute by the Sherman Act, or by any other federal antitrust law, including but not limited to the Clayton Act, the Federal Alcohol Administration Act or the Federal Trade Commission Act, this Court lacks subject matter jurisdiction over the claims alleged by petitioners. The federal courts have exclusive subject matter jurisdiction over such claims. Moreover, petitioners lack standing to assert a claim based on the latter three Acts.

THIRD AFFIRMATIVE DEFENSE

31. Petitioners allege that the Designation Statute serves legitimate and compelling governmental purposes, is constitutional and is not preempted by federal law. However, if the Court determines that the Designation Statute is constitutionally deficient in any respect, the Department of Alcoholic Beverage Control should be given an opportunity to promulgate regulations, consistent with the purposes of the Alcoholic Beverage Control Act (Business and Professions Code §23000 *et seq.*), to cure any such deficiency.

FOURTH AFFIRMATIVE DEFENSE

32. Although it is true that the prices for distilled spirits, from distillers to wholesalers have been generally higher since the *Rice* case. Wholesalers Association alleges on information and belief that there is no instance when the price of distilled spirits to a designated wholesaler in California has been raised because of or in anticipation of the passage into law of AB 499. Wholesalers Association further alleges on information and belief that such increases were based on increased costs, inflation and other factors affecting the distillers' profitability.

FIFTH AFFIRMATIVE DEFENSE

33. Wholesalers Association alleges on information and belief that there never has been a cancellation of the designation of a distilled spirits importer to import distilled spirits into California by any distiller because of any alleged failure to adhere to or follow "suggested prices," and there never has been any threat, coercion or suggestion by any distiller that unless suggested prices were followed, the designation would be withdrawn or the distributorship cancelled.

SIXTH AFFIRMATIVE DEFENSE

34. Wholesalers Association alleges on information and belief that much of the distilled spirits purchased by the nondesignated California importers from Oklahoma wholesalers is diverted in transit, and the merchandise never in fact enters Oklahoma.

WHEREFORE, Wholesalers Association prays for judgment as follows:

1. That the Alternative Writ of Mandate herein be discharged and that the Stay heretofore issued by the Court be dissolved;

2. That the Amended Petition for Writ of Mandate and/or in the Alternative, Prohibition and/or Certiorari be denied;

3. That the Court hold that the Designation Statute is valid and enforceable and free from any constitutional infirmities and that it is a valid exercise of the State's power, derived from the Twenty-first Amendment, to regulate the importation of alcoholic beverages into California.

4. That Wholesalers Association be awarded its costs of suit herein;

5. That petitioners' request for attorney's fees be denied;

6. That the Court grant such other and further relief as it may deem just and proper.

DATED: January 21, 1980

Ball, Hunt, Hart, Brown and Baerwitz
By /s/ Joseph A. Ball
JOSEPH A. BALL

William T. Chidlaw
A Professional Corporation
By /s/ William T. Chidlaw
WILLIAM T. CHIDLAW

Attorneys for Intervenor Wine &
Spirits Wholesalers of California

13. Order of the Supreme Court of the United States Granting Petitions for Writ of Certiorari, Filed November 30, 1981.

RE: Baxter Rice, Director, Department of Alcoholic Beverage Control of California v. Norman Williams Company, et al., No. 80-1012; Bohemian Distributing Company v. Norman Williams Company, et al., No. 80-1030; and Wine & Spirits Wholesalers of California v. Norman Williams Company, et al., No. 80-1052.

* * *

"The motion of United States Brewers Association for leave to file a brief as *amicus curiae* in case No. 80-1012 is granted. The motion of Lloyd H. Robertson, etc., et al. for leave to file a brief as *amici curiae* in case No. 80-1012 is granted. The motion of Wine & Spirits Wholesalers of America, Inc., et al. for leave to file a brief as *amici curiae* is granted. The petitioners for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument."

14. Contents of Appendices to Petitions for Writ of Certiorari, Respectively, of Baxter Rice, Department of Alcoholic Beverage Control, of Wine & Spirits Wholesalers of California and of Bohemian Distributing Company. These Appendices have not been reprinted but are incorporated by reference and itemized herein.

1. The following documents may be found in the appendix to the Petition for Certiorari of Baxter Rice, Director, Department of Alcoholic Beverage Control of the State of California, No. 80-1012:

Opinion below of the Court of Appeal of the State of California, Third Appellate District, July 17, 1980 ..... Pet. 1

Material relating to raising of federal questions ..... Pet. 37

2. The following documents may be found in the appendix to the Petition for Certiorari of Bohemian Distributing Company, No. 80-1030:

Opinion below of the Court of Appeal of the State of California, Third Appellate District, July 17, 1980 ..... Pet. 1a

Order of the Supreme Court of the State of California denying petition for hearing, September 24, 1980 ..... Pet. 16a

U.S. Const. Amend. XXI, section 2 ..... Pet. 17a

Pertinent provisions of the Sherman Act, 15 U.S.C. § 1 *et seq.* (1975) ..... Pet. 18a

Pertinent provisions of the California Business & Professions Code ..... Pet. 19a

Pertinent provisions of the Oklahoma Alcoholic Beverage Control Act, 12 Okla. Stat. tit. 37, § 501 *et seq.* (1978) ..... Pet. 24a

Pertinent provisions of the Kansas Statutes, Kan. Stat. § 41-101 *et seq.* as added or amended by House Bill 2020. ..... Pet. 26a

Primary source laws of the various states .. Pet. 37a

3. The following documents may be found in the appendix to the Petition for Certiorari of Wine & Spirits Wholesalers of California, No. 80-1052.

Opinion below of the Court of Appeal of the State of California, Third Appellate District, July 17, 1980 ..... Pet. 1

Order of the Supreme Court of California denying petition for hearing, September 24, 1980 Pet. 18

Relevant Oklahoma statutes and regulations Pet. 19

Peremptory writ of mandate of the Court of Appeal of the State of California, Third Appellate District, September 25, 1980 ..... Pet. 21

Primary source laws of the various states .. Pet. 22

Pertinent provisions of the California Business & Professions Code ..... Pet. 23